

Supreme Court, U. S.
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In The
Supreme Court of the United States
October Term, 1978

No. **78-160**

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
Harold Jackson, Darrell L., Harold, Harold M. and Luea
Sorenson,

Petitioners,

R. G. P. Incorporated, Otis Peterson, Travelers Insurance
Company, State of Iowa and State Conservation Commis-
sion of the State of Iowa,

Respondents (Petitioners on separate petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 11, 1978.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals, ^{575 F.2d 620} ~~not yet~~ reported, appears as Appendix A hereto. The findings of fact and conclusions of law and the memorandum opinion of the District Court of the Northern District of Iowa are report-

ed, *United States v. Wilson*, 433 F. Supp. 57, 67. Copies appear as Appendixes B and C hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing with suggestion that rehearing be in banc, was filed on April 25, 1978 and denied on May 2, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Although 25 U. S. C. § 194 (set forth at p. 5 herein) is racially discriminatory on its face, it was applied by the Eighth Circuit to this case and its parties as justification for reversing a District Court judgment quieting title in Petitioners to 2900 acres of Iowa farm land on the east bank of the Missouri River, and to transfer said land to the United States as trustee and the Omaha Indian Tribe whose reservation lies on the opposite side of the River. The Tribe and the United States claim that the land is part of the Reservation transferred to the Iowa side of the River by avulsive actions. Petitioners, the record title holders, who, with their predecessors in title, had peaceful possession of the land for more than forty years (some of it for

eighty years) prior to its invasion by the Indians in 1975, claim the land as accretion to the Iowa riparian land or to the part of the bed of the River owned by the State of Iowa. The Eighth Circuit held that neither side proved accretion or avulsion; that § 194 put the burden of proof in the sense of the risk of non-persuasion on the Petitioners, and that therefore judgment had to be for Respondents (Tribe and U. S.).

§ 194, subject to certain conditions, puts the burden of proof on "the white person" in trials over property between "an Indian" and "a white person".

In spite of the fact that the Tribe as plaintiff has filed suit to obtain an additional 8,000 acres of Iowa farm land against numerous owners, and other Indian tribes are claiming millions of acres of land, in Maine, Massachusetts, and numerous other states, with respect to which § 194 will be as applicable as in this case, the Eighth Circuit disposed of the constitutional question in footnote 18 of its opinion (App. A20).

In spite of the numerous cases in this Court (cited in *Bakke*, infra p. 12) holding that a racial classification can be justified "only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available," the Eighth Circuit held § 194 constitutional without discovering any such purpose but only some vague "unique obligation toward the Indians" (App. A20).

In spite of this Court's decision in *United States v. Perryman*, 100 U. S. 235, 25 L. Ed. 645 (1880) that "white person" in § 16 (App. E3) of the same 1834 statute in which § 194 was § 22, did not mean "not an Indian" and did not

include a Negro, the Eighth Circuit construed "a white person" to include all non-Indians (App. A25)—the State of Iowa, corporations, and individuals race and color not shown.

In spite of this Court's decision in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 50 L. Ed. 2d 550 (1977) and other cases holding that the question of title of riparian owners is one of local law, the Eighth Circuit held that federal and not state common law of accretion and avulsion was applicable (App. A20).

In spite of *Louisiana v. Mississippi et al.*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966) confirming "in all things" the Special Master's report holding that there can not be an avulsion within the bed of the stream, the Eighth Circuit held that Petitioners failed to sustain their burden of proof under § 194 because of the "possibility" that there was an avulsion within the bed of the stream (App. A27, 34).

In spite of *Nebraska v. Iowa*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892), and a long line of cases which have followed it, holding that to constitute an avulsion there must be a severance of land from one bank of the river and its attachment to the other bank in such a manner that it can still be identified as the same land, the Eighth Circuit held that such identification was not necessary or important (App. A35, 39, 42).

Because of the foregoing facts and holdings of the Eighth Circuit, this Court should grant certiorari to enable it to decide the following questions:

1. Whether Title 25 U. S. Code § 194, putting the burden of proof on "the white person" in a suit by "an

Indian", as construed and applied by the Eighth Circuit is unconstitutional because it is invidious racial discrimination and deprives Petitioners of their property and of the equal protection of the law in violation of the Due Process Clause of the Fifth Amendment.

2. Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.
3. Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.
4. Whether the Eighth Circuit erred in its determination of the governing principles of the federal common law of accretion and avulsion and its application of the law to the facts in this case.
5. Whether the Court of Appeals erred in holding that the District Court's determination that Petitioners had proved by a preponderance of the evidence that the land in question is accretion to the Iowa riparian land or to the State of Iowa's portion of the bed of the river, is clearly erroneous.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25

§ 194. *Trial of right of property; burden of proof*

In all trials about the right of property in which an Indian may be a party on one side, and a white

person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

Derivation. Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause.

No person shall . . . be deprived of life, liberty or property, without due process of law;

Other statutory provisions referred to herein as helpful in interpreting § 194 are included in Appendix E. They are the following:

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143.

An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, sections 12, 16 and 22, 4 Stat. 729, 730, 731, 733.

STATEMENT OF THE CASE

The Petitioners¹ seek a review by this Court of the decision of the Eighth Circuit reversing a judgment in favor of Petitioners in the District Court for the Northern District of Iowa, which, pursuant to their counterclaims, quieted title in Petitioners as against the Omaha Indian Tribe and the United States as trustee for the Tribe, to 2900 acres of Iowa farm land lying on the east side of the Missouri River a few miles north of Onawa, Iowa. The District Court held that these Petitioners had proven by a preponderance of the evidence that the 2900 acres was accretion to Iowa riparian land or to that part of the bed of the river which was owned by the State of Iowa, and that the Tribe and the United States had failed to prove that said land had been severed from the Omaha Indian Reservation on the Nebraska side and came to exist on the east or Iowa side of the Missouri River thalweg by reason of any avulsion or avulsions. The Eighth Circuit decision is based on (1) its construction of Title 25 United States Code § 194 as being applicable to place the risk of nonpersuasion upon these Petitioners in this litigation, and its conclusion that said section is constitutional as so applied, and (2) its ideas of the law of accretion and avulsion which conflict with the principles announced in decisions of this Court, and which led it to the conclusion that the evidence failed to prove either avulsion or accretion. On that reasoning the Eighth Cir-

¹ The word, "Petitioners," will be used to refer to the defendants, both those named as petitioners herein, and the other defendants who are filing separate petitions for certiorari.

cuit decision takes the 2900 acres away from Petitioners, who, with their predecessors in title have had possession of it for more than 40 years, some of it for as much as 80 years, and awards it to the United States as Trustee for the Omaha Tribe.

The complaint of the Omaha Tribe invoked the jurisdiction of the District Court under Title 28 United States Code §§ 1331 and 1362. The complaint of the United States as Trustee for that tribe invoked the jurisdiction of the District Court under Title 28 United States Code § 1345.

The 2900 acres is an area under the sky (of latitude and longitude) bounded on the west by the Iowa-Nebraska 1943 Compact boundary line, and on the north, east, and south by the Missouri River Nebraska shore meander line surveyed for the General Land Office in May of 1867 by Deputy Surveyor T. H. Barrett. It is sometimes referred to as the Barrett survey area. On the map, Appendix F, its boundaries are superimposed on a present day map showing the Blackbird Bend area (the area between the present river and the Iowa high bank) and showing the record ownership of that land. In 1867 this Barrett survey area was occupied by a peninsula or meander lobe pointing eastward like a thumb. The eastern two and one-half miles of it was about one and one-quarter miles wide from north to south and it became wider further west. The eastern one and one-half miles was described by Barrett as a "low sandy point" and "subject to frequent inundations, entirely worthless for cultivation."

By 1879 when the Missouri River Commission mapped the Missouri in this area, the eastern mile of the south side and two miles of the north side of Barrett's meander

lobe had disappeared, and the thalweg of the river was running through that area. Defendants' expert witnesses were all of opinion that the Blackbird Bend meander having reached its limiting width, its thalweg gradually moved west completely eroding away the low sandy point before it and throwing up sandbars behind it in the slack water.

The trial court having seen and heard the witnesses and having inspected the land in controversy, accepted the opinions of the Petitioners' experts. The Court of Appeals, however, said that the trial court's conclusion was clearly erroneous; that the evidence was speculative and conjectural, and that neither side proved either avulsion or accretion (App. A55).

In 1894 the area under the sky formerly occupied by the east end of the Barrett survey peninsula was surveyed as accretion land by the county surveyor of Monona County, Iowa and apportioned to the Iowa riparian owners accordingly. There is no record of any contemporary suggestion that there had been any avulsion in that area.

The second half of this case involves the southward migration of the meander point on the Iowa side immediately north of the Barrett survey peninsula and the disappearance of the rest of the Barrett survey area from the Nebraska side of the river between 1906 and 1927.

The Petitioners' experts were of opinion that between 1906 and 1923 the thalweg gradually eroded its way southward and the riverbed behind it became filled by deposition; that the land lying east and north of the 1923 river is all accretion land added by deposition to the Iowa high bank; that all of the land lying within the area formerly

occupied by the Barrett meander lobe is likewise accretion to the Iowa northern or eastern high bank. The trial court agreed.

As with the evidence with respect to the movement of the river between 1867 and 1879, the Eighth Circuit found the evidence with respect to the movement of the river between 1906 and 1923 to be speculative and conjectural (App. A62, 65), and accordingly that it was clearly erroneous for the District Court to decide the matter in favor of Petitioners because Petitioners had the risk of non-persuasion by reason of § 194².

2 In the absence of § 194 the burden of persuasion would be on the respondents to prove avulsion. In *Mississippi v. Arkansas*, 415 U. S. 289, 39 L. Ed. 2d 333, 94 S. Ct. 1046 (1974), in his dissenting opinion Mr. Justice Douglas quoted from the special master's report (415 U. S. 295, 296, 29 L. Ed. 2d 338):

The *burden of persuasion* was upon Arkansas. Initially Arkansas conceded that Mississippi (415 U. S. 2961) had met its initial burden, aided as it was by the presumption that the change in the thalweg of the river was the product of accretion. (Emphasis ours.)

The majority opinion states (415 U. S. 294, 39 L. Ed. 337):

We agree with the Special Master's evaluation of the evidence and conclude, as he did, that Arkansas did not sustain its burden of rebutting Mississippi's conceded prima facie case, a burden the Arkansas court has described as "considerable." *Pannell v. Earls*, 252 Ark. 385, 388, 483 S. W. 2d 440, 442 (1972).

In the cited case the Supreme Court of Arkansas said:

When land lines are altered by the movement of a stream, the weight of authority, both state and federal, appears to recognize a *strong presumption, founded on long experience and observation*, that the movement occurs by gradual erosion and accretion rather than avulsion. *United States Gypsum Co. v. Reynolds*, 196 Miss. 644, 18 So. 2d 448 (1944); *Dartmouth College v.*

(Continued on next page)

REASONS FOR GRANTING THE WRIT

1. Whether Title 25 U. S. Code § 194 as construed and applied by the Eighth Circuit in this case is an invidious racial discrimination against Petitioners and therefore denies them equal protection of the law and deprives them of property without due process in violation of the Due Process Clause of the Fifth Amendment, is an important question of federal law which has not been, but should be, settled by this Court.

The Eighth Circuit considered § 194 decisive of this case and would have rendered a decision favorable to petitioners had there been no § 194.

Other than the instant one we have found no case which has applied, construed or passed on the constitutionality of § 194.

In its complaint in this case the Omaha Tribe claims 11,000 acres of Iowa farmland³. The 2900 acres tried in this case was severed by the District Court from the Tribe's complaint and consolidated for trial with the suit brought by the United States as to the same 2900

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Rose, 257 Iowa 533, 133 N. W. 2d 687 (1965); *Kitteridge v. Ritter*, 172 Iowa 55, 151 N. W. 1097; *Bone v. May*, 208 Iowa 1094, 225 N. W. 367. (Emphasis ours.)

Elsewhere called the "rule of the live thalweg" it requires clear and convincing evidence of a cutoff to satisfy the burden of persuasion of one claiming an avulsion. See p. 25 this petition. Special Master's Report, *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250.

3 A reasonable present valuation for this land would be about \$1,000 per acre or \$11,000,000.

acres. As to the remaining 8,000 acres trial awaits final decision of this case. The record owners and occupants of the 8,000 acres are very numerous and their separate tracts are comparatively small. The application of the Eighth Circuit's ruling with respect to § 194 is unclear as to many of those tracts.

Indian tribes are now asserting claims to immense areas of land in a large number of states and authoritative determination of the construction and constitutionality of § 194 is of great importance to the tribes, states and all others having any interest in land which is or may possibly be involved in claims of Indian tribes. These include owners, lessees, mortgagees, title insurers and former owners who have warranted title. Many of those Indian claims involve events occurring 100 or even 200 years ago. Defenses of adverse possession, statutes of limitation and estoppel by laches, may, as held by the District Court in this case, be unavailable as against a tribe or the United States. Witnesses are dead and important items of evidence may never be found. A determination as to who bears the risk of non-persuasion, may, as held by the Eighth Circuit in this case, be decisive.

The Eighth Circuit deals with the question of the constitutionality of § 194 in a single footnote (App. A20). It cites and quotes *Morton v. Mancari*, 417 U.S. 535, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974). That case involved a preference in employment in the Bureau of Indian Affairs given by statute to members of "federally recognized" Indian tribes. Footnote 42 at page 35 of the opinion of Powell, J. in the very recent case of *Regents of the University of California v. Bakke*, — U.S. — (No 76-811, 6/28/78), describes *Mancari* as follows:

Petitioner also cites our decision in *Morton v. Mancari*, 417 U.S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis*. *Id.*, at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion." *Ibid.*

In *Mancari* this Court said (417 U.S. 554):

Here, the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Unlike the *Mancari* preference, the § 194 discrimination is racial. It is not reasonably and directly related to a legitimate non-racially based goal, does not further the cause of Indian self-government or make the BIA more responsive, and it is clearly a proscribed form of racial discrimination⁴. "Preferring members of any one

⁴ Other cases cited in the Eighth Circuit footnote include *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483, 48 L. Ed. 2d 96, 112, 96 S. Ct. 1634 (1976), holding that immunity from state taxation of Indian tribes and their members living on Indian reservations did not constitute an invidious discrimination against non-Indians on the basis of race; and *Fisher v. District Court*, 424 U.S. 382, 390, 391, 47 L. Ed. 2d 106, 96 S. Ct. 943 (1976), holding that the tribal court, not Montana state courts, had jurisdiction of a

(Continued on next page)

group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." (Opinion of Powell, J. in *Bakke*, supra, p.37.)

That racial discrimination under a federal statute violates the Due Process Clause of the Fifth Amendment in like manner as a comparable state statute violates the Equal Protection Clause of the Fourteenth Amendment has been pointed out by this Court in a number of cases including *Bolling v. Sharp*, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954) (school segregation in the District of Columbia), *Weinberger v. Wiesenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975) (gender discrimination in social security), *Hampton v. Mow Sun Wong*, 426 U.S. 88, 48 L. Ed. 2d 495, 96 S. Ct. 1895 (1976) (Civil Service employment discrimination against lawfully admitted resident aliens), and *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040, 48 L. Ed. 2d 597, 607 (1976) (question of racial discrimination in employment of po-

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proceeding for the adoption of one tribal member by other tribal members. The Court said (424 U. S. 390, 391):

The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . . disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

The other cases in the Eighth Circuit footnote also uphold jurisdiction of Indian courts over reservation Indians and transactions on reservations, exemption of reservation Indians from state taxes, and Congressional determination of eligibility for tribal membership and ensuing rights. Those preferences were considered reasonable and rationally designed to further Indian self-government.

licemen in District of Columbia). In *Bakke*, supra, (opinion of Brennan, White, Marshall and Blackmun, J. J., at page 43) it is stated:

To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment⁵.

The several opinions in *Bakke* had much to say with respect to the rules for determining when state or federal governmental discrimination is invidious and unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment. The following are a few excerpts:

Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. (Powell, J., p. 21).

* * *

Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. (Powell, J., p. 30).

* * *

We have held that in "order to justify the use of a suspect classification, a State must show that

⁵ The Commerce Clause—United States Constitution, Article I, Section 8, "the Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." (Powell, J., p. 36).

* * *

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. (Brennan, White, Marshall, Blackmun, J. J., p. 33).

* * *

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such classification an important and articulated purpose for its use must be shown. (Brennan, White, Marshall, Blackmun, J. J., p. 37).

* * *

It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. (Powell, J., p. 25).

The Eighth Circuit did not subject § 194 to strict scrutiny. It simply assumed that any legislation giving Indians special beneficial treatment was valid regardless of the effect such special treatment might have on the rights of other persons.

The Eighth Circuit did not find any compelling governmental purpose to support § 194. And since it found no such purpose it did not consider whether there was a less restrictive alternative for achieving such purpose.

The Eighth Circuit merely quoted *Mancari* to the effect that special treatment of Indians is permissible as long as it can be tied rationally to the fulfillment of Congress' unique obligation to the Indians. But the Eighth Circuit made no attempt to consider or point out how § 194 can be tied rationally to the fulfillment of any such vague obligation.

In the case of § 194 there is no overriding national interest justifying the patent discrimination between "the Indian" (tribe) and the "white person" (non-Indian) pursuant to which the Eighth Circuit relieves the Tribe and the United States as trustee for the Tribe of the burden of proof they would normally have as plaintiffs in a suit to quiet title; and which they would have by reason of the "rule of the live thalweg", that the boundary follows the changes in the navigable channel unless there has been clear and convincing proof of avulsion, that is, of a cutoff in which the river left its old bed and formed a new one. See p. 26 of this petition.

The discrimination on the basis of duration of residence, of citizenship, of gender and of race in the cases in which this Court found invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment or of the Due Process Clause of the Fifth Amendment are comparable to the invidious discrimination by reason of race provided by § 194, which likewise should be declared unconstitutional. If "a white

person" means a Caucasian (as we shall soon point out) rather than a non-Indian, then the discrimination is even more invidious, for the white person is singled out for invidious treatment not in a comparable situation imposed upon black, yellow, brown, or red people or upon corporations or units of government.

2. This Court should grant the writ of certiorari to enable this Court to correct the erroneous construction of Title 25 U. S. Code § 194 by the Eighth Circuit, an important question of federal law which has not been but should be settled by this Court.

(a) The Eighth Circuit erred in holding that the words "an Indian" in § 194 include an Indian tribe and the United States as Trustee for a tribe.

That the statute applies only where an individual Indian is a party seems too clear to require help from legislative history. Nevertheless we will invite attention to such legislative history as we have been able to discover. The pertinent sections of the statute are listed herein at page 5, and reproduced in Appendix E. Note that the ancestor of § 194 first appeared in the 1822 Act as § 4 (App. E2) and used the plural "Indians"—"in which Indians shall be a party on one side and white persons on the other." This was changed to the singular in the 1834 Act (§ 22, App. E3, 4)—"an Indian . . . a white person." The change from plural to singular made it clear that individuals—not groups—were contemplated.

A reason for the change from plural to singular appears to be the change in § 12 of the "Act to regulate

trade and intercourse with the Indian tribes" etc. In its 1802 form (App. E2) it made invalid any conveyance of land "from any *Indian, or* nation or tribe of Indians" unless made by treaty or convention. (Emphasis ours.) The 1834 revision eliminated "Indian, or" from § 12 (App. E3). Thus the 1834 changes made it clear that the protection of § 12 applied only to Indian tribes and nations, not to individual Indians, and protection of § 22 (§ 194) applied only to individual Indians, not to nations and tribes, thus eliminating duplication of such protective measures.

(b) The Eighth Circuit erred in holding that the words "a white person" in § 194 means all non-Indians—states, corporations and individuals whose race or color is not shown (App. A25).

The sovereign State of Iowa is not a white person. It is not even a person. In *United States v. United Mine Workers of America*, 330 U. S. 258, 275, 91 L. Ed. 884, 67 S. Ct. 677 (1947) the Court said:

The Act does not define "persons". The common usage of that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provision, Rev. State. § 1, 1 USCA § 1, 2 FCA title 1, § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.

R. G. P., Inc. and Travelers Insurance Company are corporations and as such they may be persons but they are not white persons. White persons have to be flesh

and blood people—human beings. The individual petitioners could be white persons. But the tribe and the United States apparently did not think enough of their § 194 argument to take the trouble to prove that any of the individual petitioners were white. The Eighth Circuit construes “a white person” to mean a non-Indian (App. A25). The same contention that the statutory language “a white person” should be construed to mean a non-Indian was made with respect to § 16 (App. E3) of the same 1834 Act of which § 194 was § 22. § 16 provided that when a white person was convicted of a crime committed in Indian country in which the property of a friendly Indian was taken or destroyed, the person so convicted should be sentenced to pay the friendly Indian double the value of the property, and if the offender was unable to pay at least the value, the government should pay the amount by which the offender’s payment fell short. In *United States v. Perryman*, 100 U. S. 235, 25 L. Ed. 645 (1880), suit was brought by a friendly Indian against the United States for the value of 23 head of beef cattle stolen from him by a Negro who was duly convicted of the theft. This Court held that the United States was not liable. The Court said:

It is contended, however, that the term “white person”, as here used, means no more than “not an Indian”; in other words, that the intention of Congress was to make the United States liable in the way indicated for all injuries to the property of friendly Indians by persons engaged in crime within the Indian Territory who were not themselves Indians. Such, we think, is not the true construction of the statute.

The Court pointed out that the words “a white person” were substituted for “any such citizen or other person”

used in previous statutes (§ 4, Act of 1802, App. E1) and that if Congress had wanted liability of the United States to arise by reason of theft by Negroes it could have continued to use that former language. Likewise with respect to § 22 (§ 194). If Congress had meant non-Indians it could have said so, or used the language of the former statutes referred to above. Congress used the same words “a white person” in both § 16 and 22. It is highly improbable that the same words would have different meanings in the two sections of the same statute.

(c) The Eighth Circuit erred in holding that the words “previous possession or ownership” in § 194 includes possession or ownership of land or shore in the same area under the sky, i. e. same latitude and longitude, as the land in controversy regardless of whether or not the land or shore previously possessed on the west side of the river had been completely eroded away and replaced by new accretion land on the east side of the river.

The trial court held (page 20 of District Court opinion) that § 194 was not applicable to this case because by its terms to make it applicable “the Indian” must first “make out a presumption of title in himself from the fact of previous ownership”; that to do that “the Indian” would have to show that the land on the Iowa side of the river now claimed by “the Indian” is the same land he owned on the Nebraska side in 1867, not new land added by accretion to the Iowa riparian land, and that if “the Indian” could prove that, he would not need § 194 because he would have proved his case without its help. The Eighth Circuit (opinion page 22) rejected that reas-

oning. It seems to hold that even if the 1867 land has been eroded away and replaced in the same area under the sky by accretion, it is the same land with a mere change of title. Here the Court of Appeals for the Eighth Circuit takes a position in direct conflict with the Court of Appeals for the Ninth Circuit which said in *Beaver v. United States*, 350 F. 2d 4 (C. A. 9, 1965):

The tract in question is in the same physical location as land patented to appellant's predecessor in title in 1914, and, at that time, located in Arizona. * * * If accreted land, it is *not* the land originally patented by the United States in 1914. * * * Appellants equate the precise land lost by erosion from the land on the Arizona side of the river with the precise land gained by accretion on the California side. There is not "physical identity" between the two areas of land, even though each is described as within the same Section 4, Township 9 South, Range 22 East, San Bernardino Meridian.

The Eighth Circuit says that the District Court presumes "that the reservation land has in fact been destroyed." Actually the Eighth Circuit presumed that it has not been destroyed, a presumption which is contrary to other presumptions or strong inferences favoring Petitioners including the presumption of ownership which follows record title; the presumption of ownership from possession (petitioners' peaceful possession for more than 40 years was conceded); the presumption that the land being on the east side of the Missouri River (before the 1943 Boundary Compact) was in Iowa; the presumption that public officers have properly discharged their duties (BIA reported no avulsions and claimed none from 1867 to 1975); and the strong presumption that a movement of a river has been by erosion and accretion rather than by avulsion; and to the rule of the live thalweg. Based

on its presumption of identity the Eighth Circuit finds the § 194 "fact of previous possession or ownership" from which it makes out a "presumption of title" in "the Indian." Thus the Eighth Circuit puts the burden of proof "upon the white person."

3. This Court should grant the writ of certiorari to enable this Court to correct the erroneous holding of the Eighth Circuit that federal, not state, common law of accretion and avulsion is applicable in this case, a federal question decided in a way in conflict with applicable decisions of this Court.

Petitioners submit that state law of accretion and avulsion is applicable, *Oregon v. Corvallis Sand & Gravel Company*, 429 U. S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977). And see District Court opinion, App. C 5-8. No state boundary is here in question since it was fixed by the Iowa-Nebraska Boundary Compact of 1943. There is here no showing of significant conflict between federal policy and state law to justify application of federal law. *Wallis v. Pan American Petroleum Corp.*, 384 U. S. 63, 16 L. Ed. 339, 86 S. Ct. 1301 (1966). Since the land is in Iowa, Iowa law should be applied. The law applied by the Eighth Circuit under the guise of federal common law was clearly contrary to the applicable state law.

It has long, and traditionally, been the rule announced by the United States Supreme Court that "the question of title of a riparian owner is one of local law." *Whitaker v. McBride*, 197 U. S. 510 at 512, 49 L. Ed. 857, 860, 25 S. Ct. 530 (1905). See also, *Shively v. Bowlby*, 152 U. S. 1, 45, 38 L. Ed. 331, 348, 14 S. Ct. 548 (1894); and *Corvallis*, supra, 429 U. S. 363, 379, 50 L. Ed. 2d 550,

97 S. Ct. 582 (1977) which emphasizes that "even when federal common law was in its heyday under the teachings of *Swift v. Tyson*, 16 Pet. 1 (1842), an exception was carved out for the local law of real property." See also *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224 (1876). In view of the Eighth Circuit's significant departure from state law, it is important that this court resolve this issue. Application of state law would avoid the legal confusion sure to result if federal law and state law is permitted to reign in the same locality, and indeed on the same river; simply because a federal interest is asserted by the United States.⁶

4. This Court should grant the writ of certiorari to enable this Court to correct the erroneous determination of the Eighth Circuit of the governing principles of federal common law of accretion and avulsion, decided in a way in conflict with applicable decisions of this Court.

(a) The Eighth Circuit erred in holding that an avulsion may take place within the bed of the stream.

The bed of the stream includes the area between its banks below ordinary high water mark. *United States v. Chicago & St. P. & P. R. Company*, 312 U. S. 592, 61 S. Ct. 772, 85 L. Ed. 1064, 1070 (1941). The shore is the area between ordinary high water mark and low water.

⁶ See, e.g., this court's recent decision in *California v. U. S.*, 46 LW 4997 (July 3, 1978), which invoked the state's right to impose conditions on the appropriation of water for federal use. This court recognized the "continued deference to state water law by Congress" [at p. 4999] and recognized the federal policy was to avoid "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." [at p. 5003]

Alabama v. Georgia, 64 U. S. (23 Howard) 505, 515, 16 L. Ed. 556 (1859). See also *Words and Phrases* under "Bed". The shores are part of the bed. Sandbars are parts of the bed of the stream. Since Barrett's low sandy point was without vegetation, frequently inundated and worthless for agriculture, it was clearly shore, part of the bed of the river. The Eighth Circuit (App. A44) states:

The record also supports the *possibility* that bar C [on the 1879 map] located on the eastern end of the lobe, was the same surface area described by Barrett in his notes and was not built up by accretive deposits. The record is insufficient to prove what actually occurred. (Emphasis ours.)

Upon that "possibility" the Eighth Circuit based its theory that there could have been an avulsion "within the bed of the river" between 1867 and 1879, a cutting off of a small piece of shore from the tip of the Barrett low sandy point. Again (App. A27, 34) the Eighth Circuit says that the southward movement of the river between 1912 and 1923 [better described we think as 1906 to 1927] was through "alluvion soil subject to frequent inundation" deposited after 1890, which the Court says "would not reveal any conspicuous identifiable features" (App. A63, 64). Here again the movement of the river was through the shore and sandbars, within the bed of the stream. Because the Eighth Circuit thought that Petitioners had failed to prove that there was no "possibility" that some shoreland or sandbar had not been completely eroded away as the thalweg crossed from the east to the west of it, that Court concluded that Petitioners had not sustained the burden of proof which that Court placed upon them by reason of its conclusions with regard to § 194.

The Eighth Circuit's conclusion that there could be an avulsion within the bed of the stream is diametrically opposed to the conclusion of the Special Master of this Court in the case of *State of Louisiana, Plaintiff v. State of Mississippi, et al.*, No. 14 original, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966). This Court "in all things confirmed" the Special Master's Report. The suit involved ownership of an oil well and the right to oil produced from it, the bottom hole of which was under the bed of the Mississippi River and which was on the west or Louisiana side of the thalweg when it first became a producer. Shortly thereafter the thalweg moved across the well location. Louisiana claimed the boundary had become fixed before the well was drilled because of an avulsion in 1950-52 within the bed of the river. The Special Master found in favor of Mississippi. The Special Master asked (page 17 of his report):

Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?

He answered the question in the negative. He said: The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.

This contention is untenable. All case law and all reasoning behind these rules point to the opposite

conclusion—that the general rule of the "live thalweg" is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible. . . . we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases the new channel was formed when the river "suddenly leaves its old bed and forms a new one * * *." *Arkansas v. Tennessee*, 246 U. S. 158, 173.

(b) The Eighth Circuit erred in holding that the absence of identifiable land in place, that is, land which can be identified as having been severed from the opposite bank of the river, has little probative value on the issue of accretion vs. avulsion (App. A35, 63).

The Eighth Circuit in its opinion (App. A30) cites *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892), and other Supreme Court cases which point out that the identity of the land involved, not the rapidity of the erosion and deposition, is the essential factor to make a change of channel an avulsion. It even quotes Vattel (App. A30) as quoted in *Nebraska v. Iowa*, pointing out that the transfer to be an avulsion must be "in such manner that it can still be identified." This has become textbook law. In 93 C. J. S. 750, 751 Waters, Section 76, the rule is laid down thus:

In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion, but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion.

The Eighth Circuit also cites many Nebraska cases to the same effect and we can cite many Iowa cases holding to the same rule. We will cite *Banks v. Chicago Mill & Lumber Co.*, 92 F. Supp. 232 (U. S. D. C. E. D. Ark. 1950) for its good collection of pertinent excerpts from other opinions on the point.

But then the Eighth Circuit proceeds to reject *Nebraska v. Iowa*, and the cases that have followed it, and says that identification of the land in question is not important. Then its opinion proceeds to say (App. A38):

In the present case the plaintiffs claim that a sudden and unusual jump in the thalweg *within the bed of a stream* or over, as well as around, land (*submerged or not*) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. (Emphasis ours.)

The Eighth Circuit said that the District Court holding was in error. The District Court was following *Nebraska v. Iowa* and the long line of cases which have followed it.⁷ We submit that *Nebraska v. Iowa* and the

⁷ *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) continues to be cited as accepted law by this Court as well as by other federal and state courts, e. g., *Oklahoma v. Texas*, 260 U. S. 606, 637, 67 L. Ed. 428, 435, 43 S. Ct. 221 (1922); *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), Special Master's Report pp. 14, 15, 16; *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 326, 38 L. Ed. 2d 526, 539, 94 S. Ct. 517 (1973) (Overruled on other grounds, *Oregon v. Corvallis*, *infra*); *Mississippi v. Arkansas*, 415 U. S. 289, 291, 39 L. Ed. 2d 333, 339, 94 S. Ct. 1046 (1974); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375, 50 L. Ed. 2d 550, 561, 97 S. Ct. 502 (1977).

District Court decision are sound and correct, and that it is the Eighth Circuit that is in error.

5. This Court should grant the writ of certiorari to enable this Court to correct the erroneous holding of the Eighth Circuit that the District Court's determination that Petitioners had proven by a preponderance of the evidence that the land in question is accretion to Iowa riparian land or to the State of Iowa's portion of the bed of the river, is clearly erroneous.

The Eighth Circuit's holding that the District Court's judgment is clearly erroneous is based largely on the Court of Appeals' misunderstanding of the federal common law of accretion and avulsion. But even if the law were as the Eighth Circuit deemed it to be, and sandbars and shore were to be treated as high and dry fast land, the great weight of the evidence is that the land, shore and bars in question on the Nebraska side of the thalweg were completely eroded away and the land now occupying the same space under the sky on the Iowa side came there by the process of deposition of alluvium—accretion to the left bank of the river and to the Iowa owned part of the bed of the river. We shall not elaborate upon this point in this petition. The evidence is reviewed in the findings of the District Court, Appendix B.

CONCLUSION

Because of the importance to numerous land owners, states, title insurers, mortgagees, and the Indian tribes and the United States Government of having an authoritative and correct determination of the construction, applicability and constitutionality of Title 25 U. S. Code § 194, and an authoritative and correct determination of the federal common law of accretion and avulsion and the appropriateness of its application to this land and to the additional 8,000 acres also claimed by the Omaha Tribe in the part of this litigation remaining to be tried, as well as to cases elsewhere, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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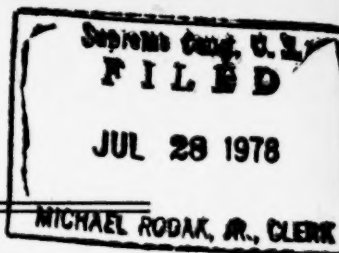
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In The
Supreme Court of the United States
October Term, 1978

No. **78-160**

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
Harold Jackson, Darrell L., Harold, Harold M. and Luea
Sorenson,

Petitioners,

R. G. P. Incorporated, Otis Peterson, Travelers Insurance
Company, State of Iowa and State Conservation Commis-
sion of the State of Iowa,

Respondents (Petitioners on separate petitions),

vs.

Omaha Indian Tribe and United States of America,
Respondents.

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

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In The
Supreme Court of the United States
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No.

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
Harold Jackson, Darrell L., Harold, Harold M. and Luea
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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Nos. 77-1384, 77-1387

No. 77-1384

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH
THE UNITED STATES (10 STAT. 1043), ORGANIZED
PURSUANT TO THE ACT OF 6/18/34 (48 STAT. 984;
25 U. S. C. 476) AS AMENDED,

Appellant,

vs.

ROY TIBBALS WILSON, CHARLES G. LAKIN, FLOR-
ENCE LAKIN, R. G. P. INCORPORATED, AN IOWA
CORPORATION, HAROLD JACKSON, OTIS PETER-
SON, TRAVELERS INSURANCE COMPANY, THE
STATE OF IOWA, DARRELL L., HAROLD, HAROLD
M. AND LUEA SORENSON, STATE CONSERVATION
COMMISSION OF THE STATE OF IOWA,

Appellees.

Appeal from the United States District Court for the
Northern District of Iowa

No. 77-1387

UNITED STATES OF AMERICA,

Appellant,

vs.

ROY TIBBALS WILSON, CHARLES G. LAKIN, FLOR-
ENCE LAKIN, R. G. P. INCORPORATED, AN IOWA
CORPORATION, HAROLD JACKSON, OTIS PETER-
SON, TRAVELERS INSURANCE COMPANY AND
THE STATE OF IOWA,

Appellees.

Appeal from the United States District Court for the
Northern District of Iowa

Submitted: June 13, 1977

Filed: April 11, 1978

Before LAY, STEPHENSON and HENLEY, Circuit
Judges.

LAY, Circuit Judge.

On March 16, 1854, the Omaha Indian Tribe entered into a treaty with the United States in which certain lands, including 2,900 acres of land located in the then Territory of Nebraska in an area known as Blackbird Bend, were reserved by the Tribe as part of an agreement which ceded to the United States all other land west of the "centre of the main channel of said Missouri river. . . ." Act of March 16, 1854, Art. 1, 10 Stat. 1043. At

¹ The treaty was entered into by George W. Manypenny, Commissioner on the part of the United States, ratified by the United States Senate and signed by President Franklin Pierce on the 21st day of June 1854. "Marks" indicating agreement of the Tribe were made by the then Chiefs of the Omaha Indian Tribe: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-mah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Tah-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; and So-da-nah-ze, or Yellow Smoke. In addition to providing for the cession of land to the United States and defining the limits of the Reservation's boundary, the Omaha Tribe agreed to vacate all other lands acknowledging their complete dependence on the government of the United States, Art. 10. The United States agreed to pay certain monies over the ensuing 40 years and to aid the Tribe by various affirmative means to "advance them in civilization." Art. 4. The other articles of the treaty include several specific covenants and pledges exchanged between the United States and the Tribe. See Act of March 16, 1854, 10 Stat. 1043.

the time the Omaha Indian Reservation was established the reserved land within Blackbird Bend was situated on the west side of the Missouri River. However, by 1923 the river had moved more than two miles to the west of the original boundary line so that much of the land contained within the original Blackbird Bend area was situated on the east side of the river. The defendants assert that early movements of the Missouri River had completely washed away the Reservation lands and that the land now existing within the former boundaries of the Barrett Survey is soil which has accreted to the Iowa riparian land.

As a result of this dispute the United States and the Omaha Indian Tribe, a duly organized corporate body, in 1975 sought equitable relief asserting their right to the 2,900 acres of land now situated in Monona County, Iowa. The United States throughout this litigation acts in the capacity of trustee of the Tribe's reservation lands.² The defendants claim title to the land in dispute and seek by way of counterclaims to quiet title in their names. The defendants are Roy Tibbals Wilson, Harold Jackson, a tenant of Roy Tibbals Wilson, Harold Sorenson, Luea Sorenson, Darrell L. Sorenson, Harold M. Sorenson, Charles Lakin, Florence Lakin, the State of Iowa and the State Conservation Commission, R. G. P. Incorporated, Travelers Insurance Company, mortgagee of R. G. P., and Otis Peterson, a tenant of R. G. P.

² While Indians have the right of use and occupancy to tribal lands, the United States holds the land as a trustee for the benefit of the Indians. See *Morrison v. Work*, 266 U. S. 481, 485 (1925). See also *Choate v. Trapp*, 224 U.S. 665, 678 (1912); *United States v. Rickert*, 188 U. S. 432, 442-43 (1903). F. Cohen, *Handbook of Federal Indian Law* 94-95 (AMS Press ed. 1972).

From at least the 1940's until April 2, 1975, the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute. After April 2, 1975, with the assistance of the Bureau of Indian Affairs and with the approval of the United States, the Omaha Indian Tribe seized possession of the land and is presently farming it. After the Tribe had seized the land the United States District Court, the Honorable Edward J. McManus presiding, granted a preliminary injunction permitting occupancy of the land by the Tribe during the pendency of this litigation, but requiring certain accounting procedures pertaining to the crops grown on the land be instituted. Following trial and entry of judgment in favor of the defendants, this court on May 13, 1977, entered a stay pending appeal maintaining in effect the terms of the district court's preliminary injunction.

After a lengthy trial the district court, the Honorable Andrew W. Bogue presiding, found that the boundary of the Omaha Indian Reservation had shifted with the movements of the Missouri River and quieted title in the defendant landowners. The court found that the plaintiffs had failed to prove that the river movements were controlled by the doctrine of avulsion and held that the river had changed by reason of the erosion of reservation land and accretion to Iowa riparian land. *United States v. Wilson*, 433 F. Supp. 67 (N. D. Iowa 1977). The district court supplemented its findings on the merits with an opinion resolving choice of law problems, setting forth principles governing avulsion and accretion and discussing the allocation of the burden of proof. *United States v. Wilson*, 433 F. Supp. 57 (N. D. Iowa 1977).

I. *The Issues.*

The dispute centers on the ownership of land in an area known as Blackbird Bend which was surveyed in 1867 by T. H. Barrett³ on behalf of the General Land Office of the United States.⁴ The basic issue on appeal is whether the boundary of the reservation remained at its 1854 location despite the significant changes in the location of the Missouri River since that time.

We vacate the judgment of the district court rendered in favor of the defendants; we find the trial court erroneously placed the burden of proof on the Omaha Indian Tribe and failed to properly apply governing prin-

3 Barrett's survey established the meander line for the Nebraska shore of the Missouri River.

4 Claims to land outside of an area described by the 1867 Barrett Survey were severed from the present case. The trial court explained the severance as follows:

Approximately 8000 acres of land claimed by the Omaha Indian Tribe in C75-4067 and all issues of damages were severed. The severance of the Barrett Survey Area from the other claims of the Omaha Indian Tribe was necessary because the Barrett Survey line is the only clearly ascertainable line of demarcation, and was the boundary of the area of which the Tribe received possession by virtue of a preliminary injunction entered June 5, 1975. Thus as to the Barrett Survey Area the action was construed as an equitable quiet title action, and the demands of various defendants for a jury trial were denied as to that area. As to lands claimed by the Tribe outside the Barrett Survey Area, the action was treated as a legal action for ejectment, in which defendant's demands for a jury trial may be sustainable. This left the 2900 acres within the Barrett Survey as the subject matter of this trial since the dispute over that land is common to all three lawsuits.

United States v. Wilson, 433 F. Supp. 67, 69 (N. D. Iowa 1977).

ciples of federal law relating to avulsion and accretion; we hold the evidence is too speculative and uncertain to show that the reservation boundary shifted by reason of accretion and that the defendants have failed to overcome the presumptive right of possession and title in the Tribe to the reservation lands.

II. *The Historical Facts.*

The Treaty of 1854 established the eastern boundary of the reserved land at the center of the main channel of the Missouri River.⁵ Because the exact location of the thalweg⁶ of the Missouri River could not now be estab-

5 Article One of the treaty provided in part:

The Omaha Indians cede to the United States all their lands west of the Missouri river, and south of a line drawn due west from a point in the centre of the main channel of said Missouri river due east of where the Ayoway river disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: *Provided, however*, that if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them.

Act of March 16, 1854, Art. 1, 10 Stat. 1043.

6 The word thalweg is derived from the German language and is said to be

[t]he channel continuously used for navigation. In other words, the thalweg is not a boundary line but in fact a boundary area, because the channel of a river is never a precise line. De la Pradelle emphasizes this special character in one of his definitions: the thalweg is that specific area in the river which is in practice the variable route followed by boatmen on their way down the river.

(Continued on next page)

lished and since the Barrett Survey was conducted only a few years after the reservation was established, the trial court accepted the Barrett Survey as representing the original location of the reservation's boundary.⁷ See Plate I.

From 1854 until sometime near 1875 it is generally accepted that the Missouri River moved east until it

(Continued from previous page)

Bouchez, *The Fixing of Boundaries in International Boundary Rivers*, 12 Int'l & Comp. L. Q. 789, 793 (1963) (footnote omitted).

The United States Supreme Court adopted the thalweg principle as the standard rule for establishing interstate boundaries in *Iowa v. Illinois*, 147 U. S. 1, 10 (1893). Later, in *Minnesota v. Wisconsin*, 252 U. S. 273 (1920), the Court explained the purpose of the rule.

The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

Id. at 282.

See also *New Jersey v. Delaware*, 291 U. S. 361, 381 (1934); *Louisiana v. Mississippi*, 202 U. S. 1, 49 (1906); *Uhlhorn v. U. S. Gypsum Co.*, 366 F. 2d 211, 215 (8th Cir. 1966); *White-side v. Norton*, 205 F. 5, 9 (8th Cir. 1913); 1 C. Hyde, *International Law* § 138 (2d rev. ed. 1951); 8 Op. Att'y Gen. 175 (1856).

7 Although the exact words used in acts of Congress defining the boundaries of a state may vary (for example, "middle of the river," "middle of the main channel," "mid-channel"

(Continued on next page)

reached the Iowa easterly high bank.⁸ The evidence shows the river was approximately 800 feet wide at that time. The first controversial movement of the river in this case occurred after it reached its easterly position against the high bank.⁹ By 1879 a survey conducted by the Missouri River Commission showed the river, at high flood stage, to be almost 10,000 feet wide covering as much as two-thirds of the Barrett Survey meander lobe. The thalweg had shifted from against the easterly high bank to a point nearly 6,000 feet to the west. *See* Plate II.

(Continued from previous page)

or "middle thread of the channel") the Supreme Court has presumed that since "[i]t is the free navigation of the river . . . that States demand shall be secured to them," *Iowa v. Illinois*, *supra* at 13, quoting *Buttenth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N. E. 439 (1888), in the absence of a contrary agreement, the middle of the main channel, the thalweg, establishes the interstate boundary. *Iowa v. Illinois*, *supra* at 13.

8 There is no disagreement as to the Tribe's description that:

The Easterly High Bank is a natural monument demarking the furthest point of progression of the eastern migration of the Missouri River from the eastern boundary of the 2900 acres, as surveyed by Barrett in 1867.

It commences at a point on the Easterly High Bank located approximately 2,200 feet southwesterly from the corner common to Sections 20, 21, 28 and 29, T. 84 N., R. 46 W. of the 5th P. M., continuing down said Easterly High Bank a distance of approximately 3-1/2 miles to a point on the Easterly high Bank approximately 4,900 feet northwesterly of the common corner of Sections 4, 5, 8, and 9, T. 83 N., R. 46 W. of the 5th P. M.

9 The exact time at which the river reached and then left the easterly high bank is not certain. All parties agree the 1875 atlas map, *see generally* Plate I, showing the river against the high bank could have been prepared sometime before 1875.

After 1879 the river moved to the northeast until it reached the Iowa northerly high bank¹⁰ sometime near 1912. *See* Plate III. The second dispute between the parties involved the movement of the river away from its northerly high bank location to a location significantly to the south in the period between about 1912 and 1923. *See* Plate IV. By 1923 almost the entire peninsula described by the Barrett Survey had been cut off by the river's movement.

10 The Tribe describes the northerly high bank as

"a natural monument demarking the furthest migration northward of the Missouri River from the northern boundary of the 2900 acres as surveyed by Barrett in 1967. . . .

The course of the Northerly High Bank is described as follows: The Iowa Northerly High Bank runs southeasterly through SE2 of Section 13, T. 84 N., R. 47 W. and continuing through the NE4 of Section 24, T. 84 N., R. 47 W., then easterly through the NW4 and the N2NE4 of Section 19, T. 84 N., R. 46 W., thence southerly approximately 2,000 feet through the E2NE4 of Section 29, T. 84 N., R. 46 W., terminating at the point of intersection of the Iowa Easterly High Bank. . . .

A10

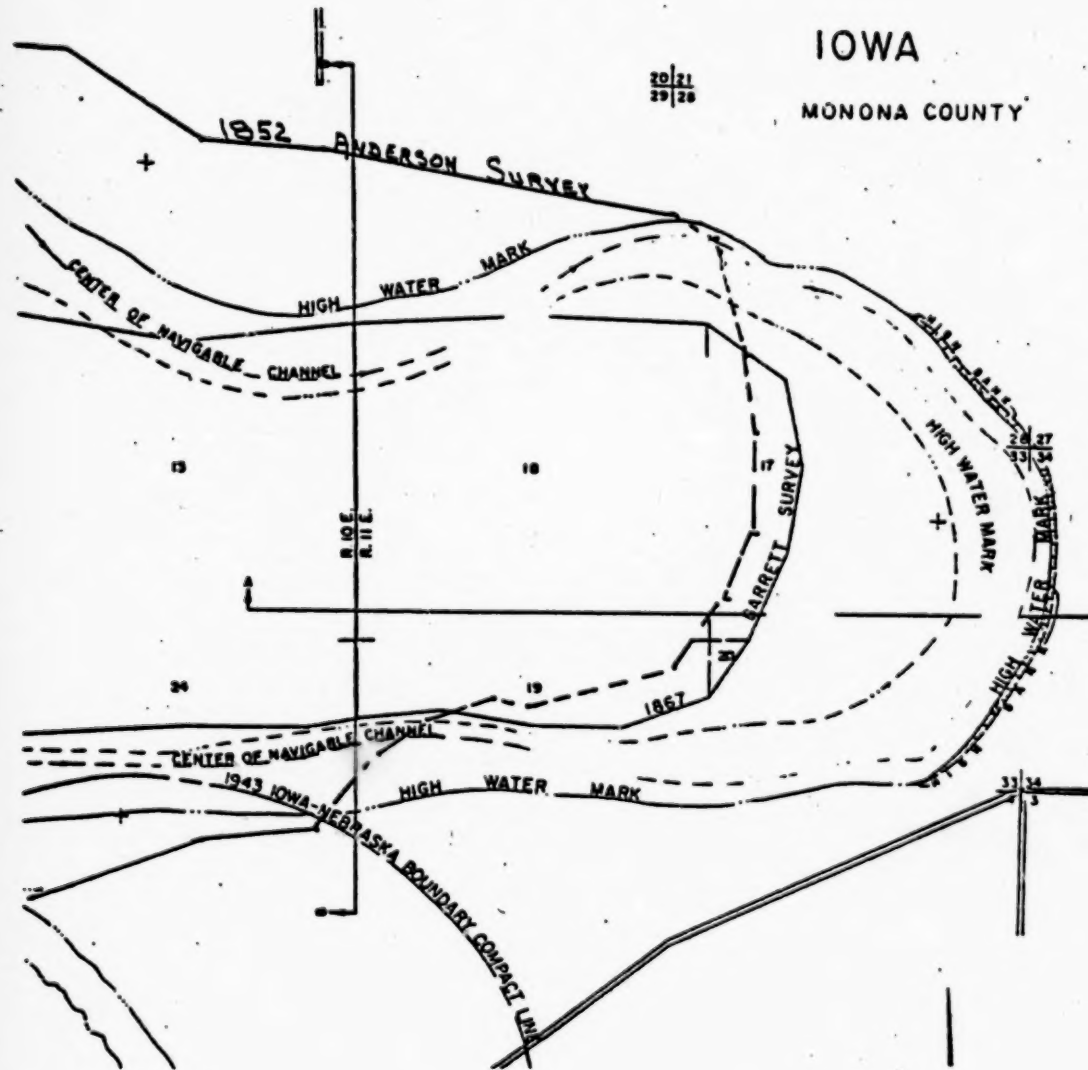


PLATE I.

Sketch of river's position in approximately 1875 showing 1852 Anderson and 1867 Barrett Survey meander lines.

A11

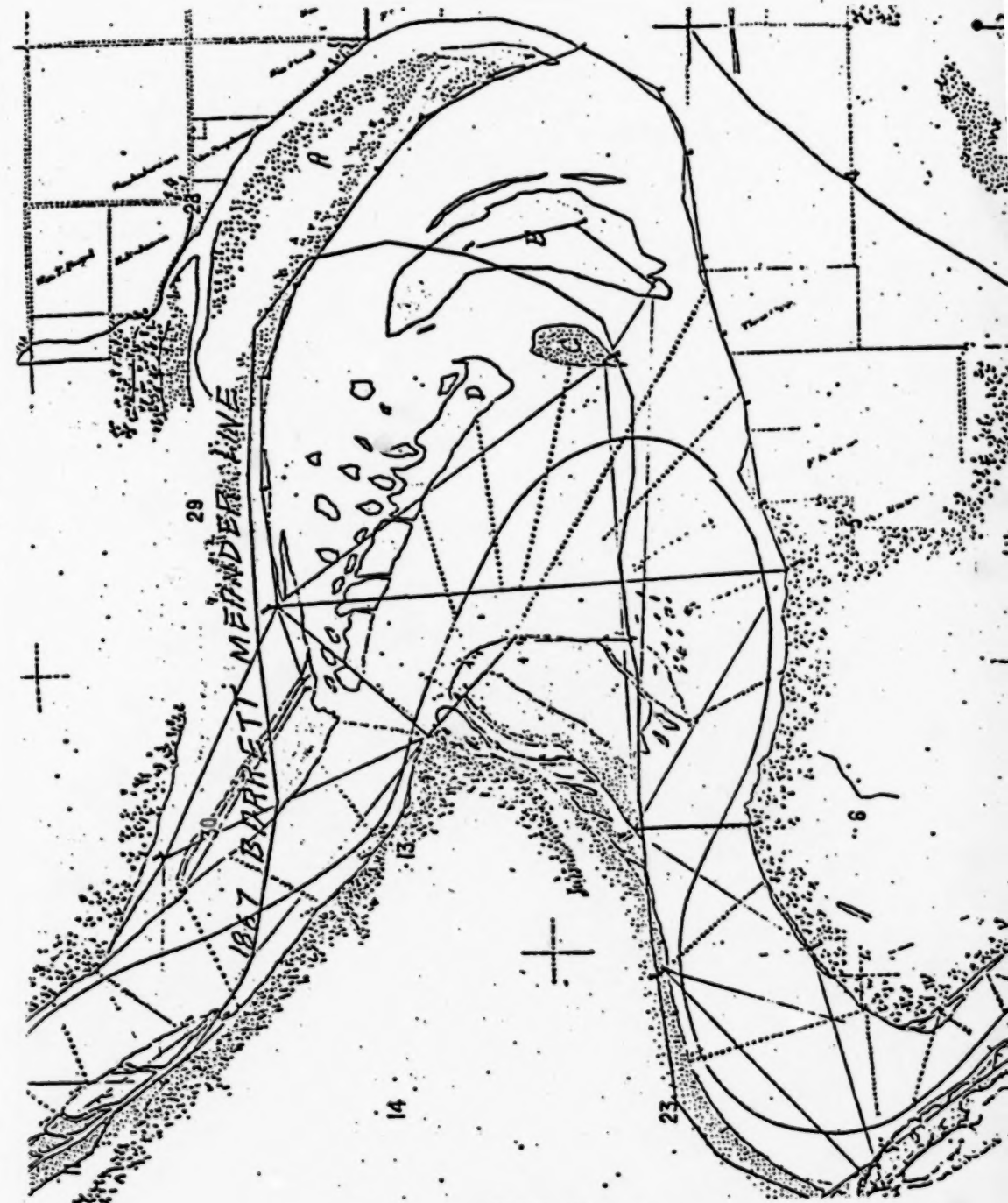
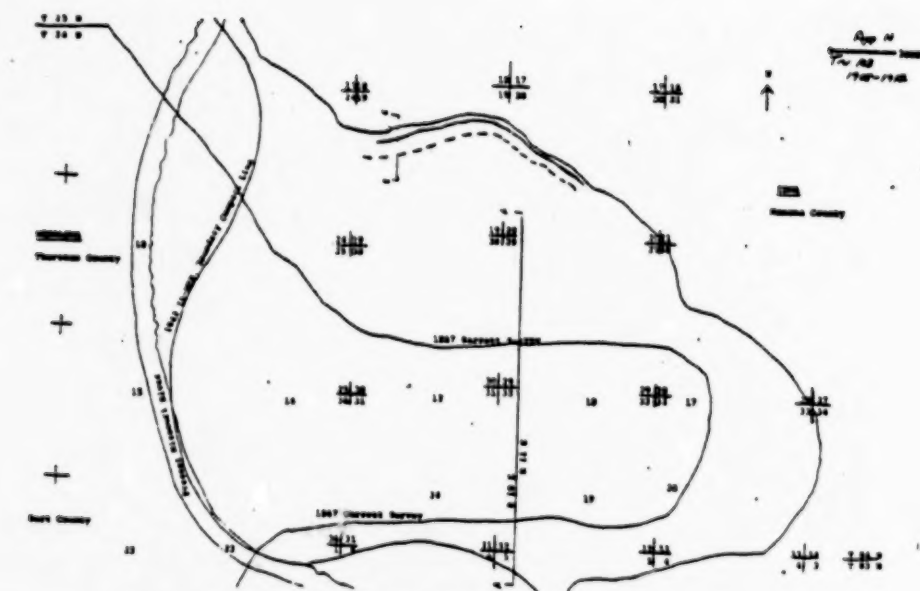


PLATE II.

1879 Missouri River Commission survey map.



Sketch of river against the northerly high bank.

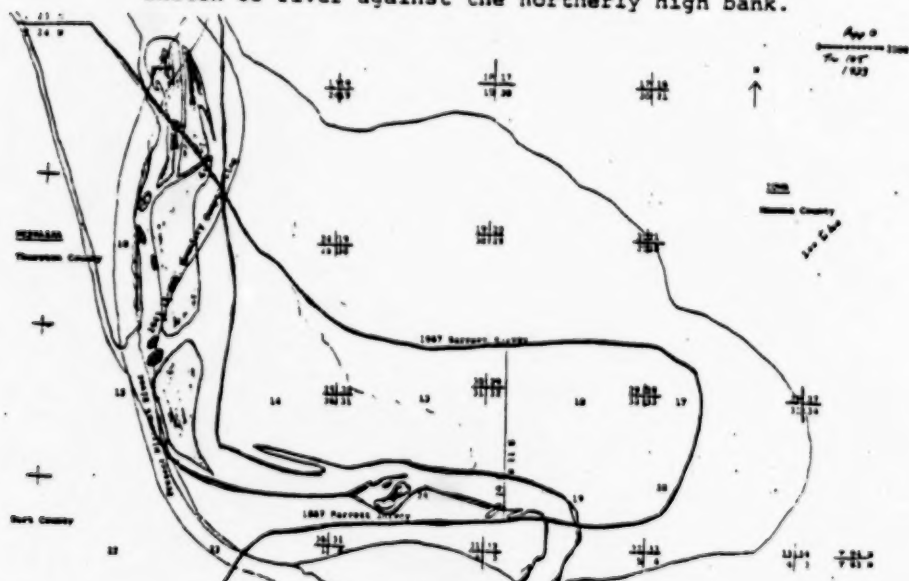


PLATE IV.

1923 Corps of Engineers map.

III. Choice of Law.

At trial the Tribe and the government asserted that federal law should control while the defendants contended that Iowa law should have been applied. The district court, however, applied Nebraska law in evaluating the facts of the case. On appeal the Tribe and the government renew their assertion that federal law should be applied in the resolution of this case. We hold that the governing principles of federal law vary significantly with the trial court's construction of state law and that the court erred in failing to apply that federal law.

A. Interstate Boundaries.

In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), the Supreme Court reaffirmed the basic rule that the laws of the several states determine the ownership of the banks and shores of waterways. *Id.* at 378-79. However, the Court recognized an important caveat to this rule:

If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. *Id.* at 375.¹¹

As the Supreme Court noted in *Arkansas v. Tennessee*, 246 U. S. 158, 176 (1918):

¹¹ See also *Illinois v. City of Milwaukee*, 406 U.S. 91, 105-06 (1972); *Arkansas v. Texas*, 346 U.S. 368, 372-73 (1953) (Jackson, J., dissenting); *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1520 (1969).

[T]hese dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

Cf. St. Louis v. Rutz, 138 U. S. 226, 250 (1891).

Federal common law is applicable even where only a single state is involved in a controversy with a private party, see *Cissna v. Tennessee*, 246 U. S. 289 (1918), or where only private parties are involved, see *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938); *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F. 2d 1006, 1009 n. 8 (4th Cir. 1976); *Port of Portland v. An Island In Columbia River*, 479 F. 2d 549 (9th Cir. 1973); *Sherrill v. McShan*, 356 F. 2d 607 (9th Cir. 1966); *Iselin v. La Coste*, 139 F. 2d 887 (5th Cir.), *cert. denied*, 321 U. S. 790 (1944), as long as the interests of more than one state are sufficiently implicated in the potential outcome. The rendering of a decision in a private dispute which would "press back" an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law.

In this case any claim that the reservation's eastern boundary had changed would of necessity have concerned the interstate boundary between Iowa and Nebraska, at least until 1943, thereby invoking federal law since both boundaries were located at the thalweg of the Missouri River. However, in 1943 Iowa and Nebraska entered into a compact under which the boundary between the states was permanently established at the middle of the main

channel of the Missouri River in essentially its position in 1943. Iowa-Nebraska Boundary Compact, Iowa Code 1971, p. lxiv; 1943 Iowa Acts ch. 306; 1943 Nebraska Laws ch. 130. Ratified by Congress in Act of July 12, 1943, 57 Stat. 494 (1943).¹² To apply the compact it is nevertheless necessary to establish title good in one state or the other as of 1943. Iowa-Nebraska Boundary Compact § 3. Good title in a state prior to 1943 in turn depends upon the location of the thalweg of the Missouri River, a determination which would have been controlled by federal law. Thus, in this case, since the issue concerns who held good title to the land in question prior to 1943, federal law must be applied.

B. Indian Law.

An equally compelling reason for applying federal law is the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated. The trial court rejected this position under the authority of *Fontenelle v. Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb. 1969), *aff'd*, 430 F. 2d 143 (8th Cir. 1970), where the Nebraska federal district court applied Nebraska law in an accretion-avulsion dispute between the Omaha Indian Tribe and Individual Indians who traced their title back through individual patents is-

¹² The compact provided for the cession of land previously lying within the boundaries of one state to the state within which it was located following the establishment of the permanent boundary. Titles, mortgages, and other liens good in the ceding state must be recognized as valid in the receiving state. Iowa Code 1971, p. lxiv; 1943 Iowa Acts ch. 306, §§ 2-3; 1943 Nebraska Laws ch. 130, §§ 2-3. See also *Nebraska v. Iowa*, 406 U. S. 117, 122 (1972).

sued to their predecessors by the United States.¹³ Instead, the trial court, finding no federal regulatory program involved¹⁴ and no specific act of Congress which displaced state law, reasoned, citing *Herron v. Choctaw & Chickasaw Nations*, 228 F. 2d 830 (10th Cir. 1956), and *Francis v. Francis*, 203 U. S. 233 (1906), that local law governed title disputes between the Indian tribe and private claimants. 433 F. Supp. at 61.

It has long been held that the rights and incidents of ownership attaching to grants made by the United States of public lands bounded on streams or other bodies of water, navigable or non-navigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. The fact that a conveyance disposes of tribal lands of Indians under guardianship does not alter the rule. See *Oklahoma v. Texas*, 258 U. S. 574, 595 (1922). The *Fontenelle* decision and the other cases cited by the trial court fall within this settled doctrine. In *Packer v. Bird*, 137 U. S. 661, 669 (1891), the Court observed:

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.

13 Although this court affirmed the district court, the issue of state vis-a-vis federal law was not discussed. This court cited only federal authorities relating to the accretion-avulsion issue.

14 See generally *United States v. Little Lake Misere Land Co.*, 412 U. S. 580 (1973).

The present dispute is not related to incidents or rights flowing from a conveyance of public land or related to a patent grant of Indian allotment lands. Instead, the direct challenge made by the Iowa landowners here affects the boundary line to the reservation land itself, as it was originally contained in the Barrett Survey and established by the Treaty of 1854. The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands.¹⁵ Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. Presumptively, at least, this right has never been extinguished. See discussion of 25 U.S.C. § 194 *infra*. Under the circumstances the Supreme Court's observation in *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661, 677 (1974), is applicable here:

In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously pro-

15 In the early case of *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 556-57 (1832), Chief Justice Marshall observed:

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

ected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

State law dealing with riparian rights cannot unilaterally extinguish or deprive Indians of their tribal lands. The land area involved in this appeal relates solely to the original reservation land. Therefore, germane here is the Supreme Court's statement in *Oneida* that: "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674.¹⁶ Riparian ownership rights have been specifically

16 The special concern for preserving Indian land in the Indians is evidenced in the immunity of trust lands from the traditional restrictions on recovering land such as statutes of limitation, laches, and adverse possession. As the Fourth Circuit Court of Appeals early observed:

The determinative fact is that the federal government has assumed towards them [the Eastern Band of Cherokee Indians] the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise, without its consent. Indeed, a statute of the United States expressly forbids the acquisition of lands of any Indian tribe by purchase, grant, lease or other conveyance, except by treaty or convention and subjects to penalty anyone not being employed under the authority of the United States who attempts to negotiate such treaty. R. S. § 2116, 25 U. S. C. A. § 177.

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held to be controlled by federal law where trust land is involved.

The nature and extent of riparian rights, if any, in the bed and banks of navigable waters is generally a matter of state law. This is a consequence of the rules that (1) the United States holds title to the bed and banks of navigable waters in trust for future states; and (2) upon admission of a state to the Union, the United States relinquishes to the state the ownership of the bed and banks of its navigable waters. The south half of Flathead Lake presents an exception. Title to the bed and banks of the south half of Flathead Lake below high water mark is held by the United States in trust for the Tribes. Thus, the basis for state determination of riparian rights is non-existent. State law, therefore, is not applicable.

Confederated Salish & Kootenai Tribes v. Namen, 380 F. Supp. 452, 461 (D. Mont. 1974), *aff'd*, 534 F. 2d 1376 (9th Cir.), *cert. denied*, 429 U. S. 929 (1976) (citation omitted).¹⁷

See also United States v. Finch, 548 F. 2d 822, 832-33 (9th Cir. 1976), *vacated on other grounds*, — U. S. —, 97 S. Ct. 2909 (1977). *Cf. Bauman v. Choctaw-Chickasaw Nations*, 333 F. 2d 785, 787-89 (10th Cir. 1964), *cert. denied*, 379 U. S. 965 (1965).

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United States v. 7,405.3 Acres of Land, 97 F. 2d 417, 422 (4th Cir. 1938) (citations omitted).

See also United States v. Candelaria, 271 U. S. 432, 440-42 (1926); *United States v. Minnesota*, 270 U. S. 181, 196 (1926); *United States v. Schwarz*, 460 F. 2d 1365, 1371-72 (7th Cir. 1972); *United States v. Ahtanum Irrigation Dist.*, 236 F. 2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (1957); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780, 784-85 (D. Conn. 1976).

17 *See also United States v. Forness*, 125 F. 2d 928, 932 (2d Cir.), *cert. denied*, 316 U. S. 694 (1942); *Schaghticoke Tribe of Indians v. Kent School Corp.*, *supra* at 783-84; *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 804 (D. R. I. 1976).

Finding the land in dispute affects an interstate boundary at the time the controversial movements occurred, and because the Tribe's right asserted to Indian trust land arises under federal law, we hold that the governing law is federal law.

IV. *Burden of Proof*

Section 194 of Title 25 of the United States Code¹⁸ provides:

Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the *burden of proof* shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

(Emphasis added).

The trial court reasoned that application of the statute to accretion or avulsion cases would be "unreason-

¹⁸ The defendants question the constitutionality of 25 U. S. C. § 194. In discussing the validity of laws granting special treatment to Indians the Supreme Court emphasized in *Morton v. Mancari*, 417 U. S. 535, 554-55 (1974), that:

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

(Citations omitted.)

See also *Moe v. Confederated Salish & Kootenai Tribes*, 425 U. S. 463, 479-80 (1976); *Fisher v. District Court*, 424 U. S. 382, 390-91 (1976). Cf. *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164 (1973); *Williams v. Lee*, 358 U. S. 217 (1959); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E. D. Wash. 1965), *aff'd*, 384 U. S. 209 (1966).

able and circuitous" and "inextricably entwined with the merits." The court's analysis was apparently based on the idea that to apply § 194 would require the court to presume that the land originally occupied by the Indians within the Barrett Survey is exactly the same land in place today. To do so, the court believed, would be to decide the merits and compel it to decide that the same land remained by reason of avulsive movements of the river. On the other hand, the court reasoned, if the land had washed away and new land had accreted to the Iowa riparian owners, the Indians had never "possessed" the new land and it would not be proper to apply the statute.

We reject this reasoning.

Application of § 194 is not a self-answering inquiry to the issues at hand.¹⁹ To hold otherwise, one must presume that the reservation land has in fact been destroyed. Furthermore, the trial court's reasoning would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river. Thus, under the trial court's rationale a party making claim to Indian land could defeat the congressional mandate by mere allegation without proof. We cannot accept the proposition that congressional policy can be so easily thwarted.

It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines. This historical fact shows "previ-

¹⁹ Two cases have cited § 194, *United States v. Sands*, 94 F. 2d 156 (10th Cir. 1938), and *Felix v. Patrick*, 36 F. 457 (C. C. D. Neb. 1888), *aff'd*, 145 U. S. 317 (1892), but neither case expounds upon the effect that section should be given.

ous possession or ownership" and is sufficient to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants. Contrary to the trial court's statement, applying the statutory burden of proof in this case does not decide the merits of the case since the fundamental issue still remains: Was there an alteration in the original boundary by reason of the marked movement of the Missouri River in the time periods involved? The defendants must bear the burden of proof that the boundary has been changed.

The early Indian Non-Intercourse Acts provided special treatment to Indian nations as the frontier was being settled. Section 194 was one of many special protective measures included in these Acts. The legislative history of the Act of June 30, 1834, 4 Stat. 729 (1846), of which § 194 was a part, clearly evidences a protectionist policy with regard to Indians.²⁰

²⁰ Section 22 of the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733, upon which 25 U. S. C. § 194 is based, is derived from a similar provision in an 1822 non-intercourse act. See Act of May 6, 1822, § 5, 3 Stat. 683. A 1924 Attorney General's opinion uses § 194 as an example of a long established practice of safeguarding Indian rights.

From the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to the questions of fact or the construction of treaties and statutes relating to their welfare. An illustration of this is found in section 2126 of the Revised Statutes (Act of June 30, 1834, 4 Stat. 733) [25 U. S. C. § 194], which provides:

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered,

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The time has been when conciliation was sought; but the time is now passed when the fear of Indian hostility should be a leading feature of our Indian intercourse. Our relation to them is now that of the strong to the weak, and demands at our hands a more liberal policy, as well directed to promote their welfare as our political interests.

H. R. Rep. No. 474, 23d Cong., 1st Sess. 10-11 (1834).

The practice of safeguarding Indians in special areas of legislation continues today. See, e. g., *DeCoteau v. District County Court*, 420 U. S. 425, 444 (1975); *Antoine v. Washington*, 420 U. S. 194, 199-200 (1975).

Defendants urge that notwithstanding the failure of the court to apply § 194, the court, after placing the burden of persuasion on the defendants to establish their counter-claim, found that the defendants had in fact proven by the preponderance of evidence their title in the property.²¹ Although the trial court observed that it felt no presumption²² aided either party, the defendants'

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not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians.

34 Op. Att'y Gen. 439, 444 (1925).

²¹ Adoption of findings proposed by the successful litigant will be upheld where supported by substantial evidence and not otherwise clearly erroneous. However, in the present case the entire opinion of the trial court relating to the evidence and findings of fact is essentially a memorandum written by the defendants. Under the circumstances we feel compelled to repeat the admonition of the United States Supreme Court in *United States v. El Paso Natural Gas Co.*, 376 U. S. 651, 656-57 (1964):

Those findings, though not the product of the workings of the district judge's mind, are formally his; they are

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not to be rejected out-of-hand, and they will stand if supported by evidence. *Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.* Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States v. Forness*, 125 F. 2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case.

(Emphasis added) (citations omitted) (footnote omitted).

- 22 Under Iowa law there is a common law presumption in favor of a finding of accretion. *Kitteridge v. Ritter*, 172 Iowa 55, 151 N.W. 1097 (1915). No such presumption exists under Nebraska law. See *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960). Whether a presumption of accretion exists under federal law is uncertain; Mr. Justice Douglas alludes to such a presumption in his dissent in *Mississippi v. Arkansas*, 415 U.S. 289, 295-96 (1974) (Douglas, J., dissenting). Cf. *Nebraska v. Iowa*, 143 U.S. 359, 369 (1892).

The existence of a presumption of accretion, however, does not affect the outcome here. Under the Federal Rules of Evidence a presumption loses its vitality once sufficient evidence on a disputed issue has been presented to permit a fact finder to act upon it. See Fed. R. Evid. 301; Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 Va. L. Rev. 281, 285 (1977); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 713 (6th Cir.), cert. denied, 423 U.S. 987 (1975); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 301[02], at 301-28 (1976); McCormick's *Handbook of the Law of Evidence* Ch. 36, § 345 (2d ed. E. Cleary ed. 1972). The Tribe having presented substantial conflicting evidence on the issue of accretion, any presumption of accretion disappeared and had no further effect on their case.

The presumption of accretion, which affects only the burden of going forward with evidence, should not be confused with the burden of proof, that is the risk of non-persuasion, found in § 194. As Professor Fleming James noted:

The term "burden of proof" is used in our law to refer to two separate and quite different concepts. . . . The two distinct concepts may be referred to as (1) the risk of non-persuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evi-

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reasoning as adopted by the trial court, erroneously focuses on the failure of the Tribe to carry a burden of proof to establish title to the land. In discussing the factual evidence, the court's opinion focuses almost entirely on the inability of the Tribe to prove that the movement of the thalweg was brought about by avulsion.²³

We find that the trial court improperly placed the burden of proof on the Indians in the instant case. Title to the Blackbird Bend area as depicted by the Barrett Survey was presumptively shown to be in the Tribe and therefore, notwithstanding the subsequent movement of the thalweg of the Missouri River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question.

We now proceed to an examination of the governing principles of law.

V. Law of Accretion and Avulsion.

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dence, or simply the production burden or the burden of evidence.

James, *Burdens of Proof*, 47 Va. L. Rev. 51 (1961).

Section 194 is designed to allocate the burden of persuasion and not merely to affect the burden of going forward with the evidence.

- 23 The court observed in its opinion that:

The plaintiffs failed to sustain their burden of proving that any sudden change of the Missouri River channel occurred in the Blackbird Bend area detaching a block of Omaha Indian Reservation land from the Nebraska bank to the Iowa bank, which land was capable of identification as such, either during the period from 1867 to 1879, 1906 to 1923, as contended by the plaintiffs, or at any other time material herein.

433 F. Supp. at 88.

It is fundamental that:

[W]here running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. . . .

Arkansas v. Tennessee, 246 U.S. 158, 173 (1918).

See also *Missouri v. Nebraska*, 196 U.S. 23, 34-35 (1904); *Nebraska v. Iowa*, 143 U.S. at 360-61; *Mayor, Aldermen & Inhabitants of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836). Equally well settled is the proposition that

[i]f the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

Arkansas v. Tennessee, *supra* at 173.

See also *Missouri v. Nebraska*, *supra* at 35; *Nebraska v. Iowa*, 143 U.S. at 361.

The trial court found that the eastern boundary of the Omaha Indian Reservation changed with the shifting river since the tribe had failed to show that the river had moved by avulsion. In reaching this result the trial court ruled that an avulsion occurs only where a sudden shift in a channel cuts off land "so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed." 433 F. Supp. at 73. In doing so, the trial court rejected the plaintiffs' theory that the doc-

trine of avulsion is equally applicable when a sudden and perceptible shift of the thalweg occurs within the bed of the stream or *over* as well as around land in place. The government's evidence was that such a perceptible shift might occur when the river goes out of its bed and the land is submerged by a flood or freshet. We find the district court too narrowly focuses on identifiable land in place as the sole criterion of avulsion without giving proper weight to the plaintiffs' theory of their case and to the factual record presented.²⁴

The Supreme Court has defined accretion as "an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived. . . ." *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 193 (1890).²⁵ In contrast, avulsion has been said to occur in various ways. One observation is that it occurs where there is a "sudden change of the banks of a stream such as occurs when a river forms a new course by going through a bend, the sudden abandonment by a stream of

24 The actual trial lasted over one month; the trial record constitutes 3,216 pages and includes over 150 exhibits.

25 The rule of accretion, which found its origins in Justinian's Institutes—

Moreover, that ground which a river hath added to your estate by alluvion, becomes your own by the law of nations. And that is said to be *alluvion*, which is added so gradually, that no one can judge how much is added at each moment of time.

T. Cooper, *The Institutes of Justinian*, Lib. II, Tit. I, § 20 (3d ed. 1852)—

was based on the proposition that the "imperceptible nature of the acquisition" is "too minute and valueless to appear worthy of legal dispute or separate ownership." Hall, *Rights of the Crown in the Sea-Shore*, in S. Moore, *A History*

its old channel and the creation of a new one, or a sudden washing from one of its banks of a considerable quantity of land and its deposit on the opposite bank."²⁶ III American Law of Property § 15.26, at 855-56 (1952) (footnotes omitted).

A clear distinction between accretion and the sudden and perceptible movement associated with avulsion is, however, often obscured when applied to the actual movement of uncontrolled rivers. The Supreme Court emphasized the unpredictability of the Missouri River in *Nebraska v. Iowa*, 406 U.S. 117, 119 (1972):

[E]xperience showed that "the fickle Missouri River . . . refused to be bound by the Supreme Court decree [of 1892]. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'that of avulsion.'" Eriksson, Bound-

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of the Foreshore 793 (1888). See also 1 G. Baker, Halleck's International Law ch. VI, at § 25 (1908); 8 Op. Att'y Gen. 175, 177-78 (1856). Imperceptibility, in the sense that "though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on," *St. Clair v. Livingston*, 90 U.S. (23 Wall.) 46, 68 (1874), is the accepted test for accretion today. See, e.g., *Littlefield v. Nelson*, 246 F.2d 956, 958 (10th Cir. 1957); *United States v. Commodore Club, Inc.*, 418 F.Supp. 311, 322 (E.D. Mich. 1976); *Schafer v. Schnabel*, 494 P.2d 802, 807 n. 19 (Alaska 1972).

26 Justinian described avulsion as follows:

But, if the impetuosity of a river should sever a part of your estate, and adjoin it to that of your neighbour, it is certain, such part would still continue yours.

The Institutes, *supra* § 21.

aries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927).²⁷

The early decision in *St. Louis v. Rutz*, 138 U.S. 226 (1891), illustrates an attempt at more closely defining avulsion in light of actual river conditions. The Court found that violent erosion of shoreland along the Mississippi River between 1865 and 1875 was avulsive in nature, sustaining findings that "the caving in and washing away of the same was rapid and perceptible. . . . [occurring] principally at the spring rises or floods of high water in the Mississippi. . . ." *Id.* at 231.²⁸

27 The early movements of the Missouri River were described as "remarkably impetuous," flooding being common on the river.

The regular floods are two in number, and usually occur in April and in June. The first is extremely violent and of short duration, rarely lasting over a week or ten days; it seems to come largely from the upper river. The June rise, although generally higher, is of longer duration, being influenced by local rains and the general saturation of the soil. . . . The April rise is generally the most destructive, for it shows, for a time at least, a tendency to follow the channels developed during the low water season preceding, and, as a consequence, the banks are attacked with extreme violence. . . . Both, however, have sufficient power to produce tremendous effects and bring about the most astonishing changes.

Preliminary Report Upon the Improvement of the Navigation of the Missouri River, in Annual Report of the Chief of Engineers app. S, at 1651 (1881).

28 The perceptible nature of the erosion along the bank was described as follows:

[D]uring each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and were carried away at one time. . . .

St. Louis v. Rutz, 138 U.S. 226, 231 (1891).

Rapidity of erosion as the determinative factor in a finding of avulsion was, however, rejected in early dicta in *Nebraska v. Iowa*, 143 U.S. 359 (1892). See also *Oklahoma v. Texas*, 260 U.S. 606 (1923) (where the Court applied the rule of accretion, following *Nebraska v. Iowa*, to the Red River); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912). Although the litigated facts of *Nebraska v. Iowa* appear to have dealt only with the movement of the Missouri River cutting across the neck of a U-shaped land formation commonly known as an ox-bow,²⁹ the Court expressed its view that the rapidity of the process of subtraction or addition did not prevent application of the rule of accretion.

In discussing the rules of accretion and avulsion the Supreme Court quoted, among others, Vattel, an early civil law authority. Vattel's formulation of avulsion held that "when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified,

²⁹ The Court in its concluding paragraph relates:

It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

Nebraska v. Iowa, 143 U.S. at 370.

the property of the soil so removed naturally continues vested in its former owner."³⁰ 143 U.S. at 366.

It is obvious, however, when viewed in the context of the entire opinion, that the Court was not seeking to narrow the traditional scope of avulsion but merely to demonstrate that the rule of accretion, as traditionally defined, was equally applicable to the Missouri River. The Court, in defining avulsion, cited Gould on Waters, noting:

It is *equally* well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This *sudden* and *rapid change of channel* is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark

³⁰ It is in this context that the Nebraska cases relied upon by the district court relate that one of the significant factors of avulsion is identifiable land in place. See *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W. 2d 538 (1943), vacating 141 Neb. 517, 4 N.W. 2d 290 (1942); *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647 (1935); *Iowa R.R. Land Co. v. Coulthard*, 96 Neb. 607, 148 N.W. 328 (1914). These and several other state cases—*Yuterman v. Grier*, 112 Ark. 366, 166 S.W. 749, 751 (1914); *Longabaugh v. Johnson*, 321 N.E. 2d 865, 867 (Ind. App. 1975); *Coulthard v. Stevens*, 84 Iowa 241, 50 N.W. 983, 984 (1892); *McCormick v. Miller*, 239 Mo. 463, 144 S.W. 101, 103 (1912); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm*, 172 Wis. 363, 178 N.W. 569, 573 (1920)—which discuss identifiable land in place as one of the key factors in a finding of avulsion, all ultimately rely on either *Nebraska v. Iowa* or a Missouri case, *Benson v. Morrow*, 61 Mo. 345 (1875).

the limits of the two estates." 2 Bl. Com. 262; Angell on Water Courses, § 60; *Trustees of Hopkins' Academy v. Dickinson*, 9 Cush. 544; *Buttenuth v. St. Louis Bridge Co.*, 123 Illinois, 535; *Hagan v. Campbell*, 8 Porter (Ala.) 9; *Murry v. Sermon*, 1 Hawks (N.C. 56.

143 U.S. at 361 (emphasis added).

After *Nebraska v. Iowa* only a few federal cases have addressed the scope of the avulsion rule in a context other than an ox-bow cut-off involving permanently emerged land in place.³¹ In *Veatch v. White*, 23 F. 2d 69 (9th Cir. 1927), the facts revealed that:

Years ago, between 1859 and 1874, in the southern shore of Puget Island there was a slough running in a north westerly direction from the Columbia river. The slough, although only used by fishing boats, had a channel that was shallow and more or less filled with snags. So much of the area of Puget Island as was separated from the mainland by this slough was called Coffee Island, which gradually became submerged. Some time before 1894 the water of the river began to bore out and enlarged the slough, and when freshet waters of 1894 came the slough was so enlarged that a channel formed, which after 1894 was used for navigation. After this new channel was created, shoals formed to some extent on the south, or Oregon, side of Coffee Island, and navigation on that side became unsafe for deep draft ships. . . .

Id. at 70 (emphasis added).

31 The language and expressions in the *Nebraska v. Iowa* decision may, as the Supreme Court of Alabama remarked, "cause some confusion unless care is had in observing them." *Greenfield v. Powell*, 220 Ala. 690, 127 So. 171, 172-73 (1930). See also *Willett v. Miller*, 176 Okla. 278, 55 P. 2d 90, 93-94 (1935).

Relying on the definition of avulsion in *Nebraska v. Iowa*, the court held that:

[T]hough by erosion of Puget Island the river has widened and the center of the old channel has been changed somewhat, and has become more shallow than it was at the time of the fixing of the boundary of the state of Oregon, such changes are not to be confused with changes made by the creation of the slough channel, which was caused by sudden and known causes, not by accretion. The demarking line must therefore remain the center of the channel between Puget Island and Oregon before the avulsion.

Id. at 71 (emphasis added).

This court applied the same rationale in *Uhlhorn v. U. S. Gypsum Co.*, 366 F. 2d 211 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967), where the end of a meander bend in the Mississippi River gradually became separated from the mainland area by a small channel. During a flood in 1938 the subsidiary channel was scoured out making it the main navigational channel following the flood. Relying upon *Nebraska v. Iowa*, this court, through Judges Vogel, Van Oosterhout and Mehaffy, held that, despite the fact that the bar separating the old and new channel was as much as four feet under water when the change occurred, the change was avulsive.³² *Id.* at 219-20. The court observed:

32 Several other decisions have also recognized that the submergence of land around or over which a channel shifts does not prevent a finding of avulsion. See, e.g., *Widdicombe v. Rosemiller*, 118 F. 295, 299 (C. C. W. D. Mo. 1902); *Fowler v. Wood*, 73 Kan. 511, 85 P. 763, 768 (1906); *Nix v. Dickerson*, 81 Miss. 632, 33 So. 490 (1903). Cf. *Mulry v. Norton*, 100 N. Y. 424, 3 N. E. 581 (1885).

In most instances where a river changes by avulsive processes, it has left intervening land above high water mark, *but we do not think the elevation of the land mass between an old channel and a new one that is cut by avulsive processes is a decisive criterion for a change in a state boundary.* By all logic and reason, the boundary should not and does not change from the original thalweg except as the Supreme Court said in *State of Arkansas v. State of Tennessee*, supra, "by gradual process." Since there was admittedly nothing gradual here, we conclude and believe that *State of Arkansas v. State of Tennessee*, supra, commands that the boundary remains in the thalweg of the Bendway Channel subject to its erosion and accretions occurring prior to its stagnation and death.

Id. at 219 (emphasis added).

Several state cases have similarly recognized that the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion.³³

³³ In *Eaton v. Francis*, 484 P. 2d 128, 131 (Colo. App. 1971), the court held that:

According to the trial court's findings, which were based upon sufficient evidence and are therefore binding upon appeal, the Arkansas River moved from its old location to its new one as result of the great flood in 1921. To gain by accretion, it is necessary to show a slow imperceptible shifting of the river's course over a long period of time. A sudden violent shift or avulsion, as the court found occurred here, does not shift the boundaries of the lot to conform to the new banks of the river. Rather the lots remain the same, that is, bounded upon the old bank of the river not the new.

(Citations omitted.)

See also *City of Lawrence v. McGrew*, 211 Kan. 842, 508 P. 2d 930, 932 (1973); *Wood v. McAlpine*, 85 Kan. 657, 118

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Our review of the foregoing authorities leads us to conclude that, although evidence of identifiable land in place may have some probative value that erosion has not occurred, the fact that intervening land may not be visible at the time a sudden flood or freshet occurs is not conclusive in itself.³⁴ To reason otherwise would be to limit

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P. 1060 (1911); *Fowler v. Wood*, 73 Kan. 511, 85 P. 763 (1906); *Sharp v. Learned*, 195 Miss. 201, 14 So. 2d 218, 220 (1943); *Bode v. Rollwitz*, 60 Mont. 481, 199 P. 688 (1921); *Nolte v. Sturgeon*, 376 P. 2d 616, 619-21 (Okla. 1962); *Buchheit v. Glasco*, 361 P. 2d 838, 841 (Okla. 1961); *Harper v. Holston*, 119 Wash. 436, 205 P. 1062, 1064 (1922). Cf. *Costal Indus. Water Auth. v. York*, 532 S.W. 2d 949, 952 (1976); *Jourdan v. Abbott Constr. Co.*, 464 P. 2d 311, 314 n. 3 (Wyo. 1970).

³⁴ Both state and federal case law also recognize an exception to the accretion rule where a stream moves gradually around or jumps across a land area, thereby markedly altering the river's channel. The rule in these cases, sometimes known as "the island rule," has not been confined to islands. In *Davis v. Anderson-Tully Co.*, 252 F. 681, 685 (8th Cir. 1918), the court applied the principle to a peninsula and observed:

To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, *not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course*, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation.

(Emphasis added.)

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the rule to the rare situation involving only an *obvious* neck cut-off where intervening land is not submerged. The history of the rule, the case law developed under it, and the policy underlying the doctrine all support a broader application.³⁵

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See also *Washington v. Oregon*, 211 U.S. 127, 134-36 (1908); *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 403-11 (1870); *Commissioners of Land Office v. United States*, 270 F. 110, 113-14 (8th Cir. 1920), *appeal dismissed*, 260 U.S. 753 (1922); *State v. Ecklund*, 147 Neb. 508, 23 N.W. 2d 782, 789-90 (1946).

- 35 One author has noted that changes or movements of rivers may be divided into three basic categories: (1) gradual changes in the river caused by erosion and accretion; (2) sudden changes in the river caused by erosion and avulsion without cutting a new bed; and (3) where the river itself cuts a new bed. In discussing these changes, Professor Bouchez explored the policy rules behind boundary river principles:

When an alteration in the boundary river has been caused by a gradual process of erosion and accretion, the best solution is the adjustment of the boundary to the changed situation. Such a procedure will mean the functional meaning of the thalweg boundary will be maintained. In addition the damage caused to one of the States by slight alterations will generally be of minor importance. Damage arising from slight alterations will not continuously affect in the long run only one of the riparian States.

The second category of alterations is a more difficult problem. Maintenance of the boundary as it existed before the alteration of the thalweg will abolish the functional meaning of the thalweg boundary. If on, the other hand, the boundary follows the new thalweg serious damage may be caused to one of the riparian States. An example of such a situation is the Chamizal tract. The interests of the State put at a disadvantage by the instantaneous alterations of the thalweg must be considered as the dominant factors in order to find an equitable solution.

If the injured State is primarily interested in navigation the new thalweg is perhaps the best boundary. If the area, which has been partly destroyed or seriously

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In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 327 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Supreme Court explained:

The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied.³⁶

Undisputed historical data relating to the early movements of the Missouri River make clear that the wild and uncontrolled movements of the river did not occur with mathematical precision or follow predictable paths. In fact, as the voluminous testimony and documentary evidence presented by both sides reveal, accretion and avulsion are interrelated phenomena often occurring to-

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damaged by the alterations of the thalweg, is of vital importance for a State, the maintenance of the old boundary is to be preferred.

Bouchez, *The Fixing of Boundaries in International Boundary Rivers*, 12 Int'l & Comp. L. Q. 789, 808 (1963).

- 36 The statement in *Bonelli* followed from earlier authorities which similarly emphasized the inequities that would arise were the rule of avulsion not available.

[I]f the change does not come within the definition of gradual and imperceptible, but the land is rapidly washed away on one side and formed on the other, the fiction should give way to the fact, and the owner should not lose title to his property. The title to the land itself is of more importance than the riparian right of access to the water or convenience of having a natural, rather than a mathematical, boundary; and rules which were made for convenience should not be permitted to wrest the title to land from its true owner.

3 Farnham on Waters § 848, *quoted in Fowler v. Wood*, 73 Kan. 511, 525, 85 P. 763, 768 (1906).

gether and in fact often acting as the motivating force for each other. Erosion and accretion, for example, may change the angle at which a river attacks a downstream bank, increasing the likelihood of an avulsive cut-through. Erosion may narrow the neck of a meander bend producing the necessary conditions for an ox-bow cut-off. Or, as the government asserts, an avulsion can produce river characteristics such as low river current energy areas which are favorable to rapid deposition.

When weighed with the significant policy considerations involved, we hold that, under governing principles, the critical determinant of avulsion is a sudden perceptible shift of the channel.³⁷ Only where the thalweg gradually moves through the intervening land as a direct consequence of erosion *and* the imperceptible process of accretion to the forming bank do the policies underlying the accretion and avulsion rules justify altering permanent land boundaries to conform with the gradually changing thalweg.

In the present case the plaintiffs claim that a sudden and unusual jump in the thalweg within the bed of a

37 Another form of avulsion, of course, is recognized in the highly unusual case where identifiable land is visibly torn from one bank and carried downstream to a resting place. The Supreme Court, however, in *Nebraska v. Iowa*, noted that this type of avulsion could not occur on the Missouri River.

No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore.

143 U. S. at 369.

Cf. *St. Louis v. Rutz*, 138 U. S. at 249-51.

stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion. We therefore conclude that it was error for the trial court to reject the plaintiffs' legal theory in its evaluation of the evidence.

We now turn to the factual findings of the district court.

VI. *The 1875-1879 Movement of the Thalweg.*

The basic finding essential to the defendant's case is the trial court's statement that "the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area" 433 F. Supp. at 88. In reviewing this finding our task is not made easier by the district court's verbatim adoption of the defendant's analysis of the evidence and proposed findings of fact including the defendants' credibility assessments of the witnesses.³⁸ We

38 The trial court did, however, express a caveat near the end of its opinion, that "certain findings of fact, even if agreed upon, would not lead in the minds of all parties concerned to a definite legal conclusion; *i. e.*, that either an avulsion

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hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence.

The defendants' proof, and the trial court's conclusion that erosion and accretion produced the movement in the river between 1875 and 1879, rest essentially upon six factual premises. First, defendants assert that bar A (*see* Plate II) must have been of recent origin (not land in place) since it was situated in the area formerly occupied by the old channel and because willows were the only vegetation growing on the bar. Thus, they contend that the river must have eroded the meander lobe and through the process of accretion deposited the crescent shaped sand bar depicted as bar A during its westward movement. The defendants next point to expert testimony that the remnant channel between bar A and the easterly high bank is a "common phenomenon" associated with erosion and accretion. Such channels are produced, they assert, when a river gradually moves away from its previous channel by the process of erosion and accretion. The accretive deposition then closes the old channel at its upper end forming the remnant channel. Third, defendants' experts assert that bars B and D shown on the 1879 map could not have been identifiable land in place since they were barren of vegetation. Instead, they suggest that the bars were middle sand

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or an accretion took place at key times in history at particular places on the Missouri River." 433 F. Supp. at 89. The district court nonetheless concluded that it was "convinced that one particular set of conclusions can be squared with the evidence far better than other proposed conclusions." *Id.* Notwithstanding its rejection of the Tribe's or the government's broader approach to the doctrine of avulsion, the court conceded that it was "apparent that the movements of the Missouri River have not been so clean and precise that they easily fall into the legal categories conveyed by the terms 'accretion' and 'avulsion.'" *Id.*

bars formed behind the southerly and westerly migration of the river. Defendants further contend that since no cottonwood trees, which grow only on land that is stabilized and not subject to frequent inundation, were shown to be growing on bar C, the bar must have been completely eroded away as the river moved. Defendants also find support for their accretion theory in the opinion of one of their experts that the parallel positioning of bars A, B, C and D was consistent with a gradual southwesterly movement of the river as a result of erosion of the meander lobe. Finally, the defendants introduced the experiments of Captain J. F. Friedkin³⁹ into evidence which, along with hydrologic experience, allegedly showed "that during high water flows, the river will flow and erode against the upper side of a point bar . . ."⁴⁰

The court concluded on the basis of this evidence that the meander lobe was eroded away as the channel moved over the area where the lobe had existed. Thus, the court ruled that the shift in the course of the river was a consequence of progressive scour and deposition, that is by accretion. 433 F. Supp. at 77-78.

39 Captain J. F. Friedkin of the United States Corps of Engineers from 1942 through 1944 conducted one of the pioneering studies of river hydrology.

40 Defendants' expert witness, George R. Hallberg, Chief of the Research Division of the Iowa Geological Survey, testified that every meander bend has a maximum width. Once the river reaches the maximum width it becomes more efficient for it to flow over the inside of the bend, and erode across the point bar, thereby decreasing the width of the bend. This process occurs at constant discharge rates; and accelerates at high discharge. Hallberg theorized that some time between 1867 and 1875 Blackbird Bend reached its maximum width and the thalweg began flowing against the meander lobe.

Our analysis of the record leads us to conclude that the evidence presented at trial as a matter of law was insufficient to satisfy the defendants' burden of proving by the preponderance of the evidence that erosion and accretion were responsible for the significant shifts of the river between 1875 and 1879.

A. Identifiable Land in Place.

The years from 1875 through 1879 were years of extremely high water flow on the Missouri River; no other four year period equaled or exceeded the maximum discharge for those years.⁴¹ Defendants' experts agreed that during this time the meander lobe was low, at times entirely under the surface of the moving river and extremely vulnerable. This is corroborated by Barrett, who in his 1867 survey described the eastern end of the meander lobe as a low sandy point.

Recognizing that identifiable land in place may in given circumstances have probative value in helping to distinguish between accretion and avulsion, that is, at least in the sense of determining whether intervening land has been completely eroded or not, little significance can be attached to its alleged absence under the evidence adduced in the present case. The defendants urge that absence of identifiable land in place provides the necessary inference of erosion of the original reservation land. However, the trial court's finding that in 1879 bar A was of recent origin and was not identifiable land in place does

⁴¹ In 1875 there was a discharge of 140,000 cubic feet per second. In the next four years, the maximum discharges recorded were 300,000, 200,000, 215,000 and 220,000 cubic feet per second.

not afford a permissible inference that the original reservation land had been eroded since, as the trial court itself pointed out, at least part of bar A was located within the area of the old abandoned channel. No land could be eroded if it never existed in the first place. Under the circumstances it is obvious that bar A is nothing more than land formed by deposition after the channel was abandoned.

The evidence that bar D and part of bar B, lying to the west of bar A, and inside the Barrett Survey lines, were not identifiable land in place is equally inconclusive. It is conceded that the eastern end of the Barrett Survey was made up of sandy material. Thus, even if the river changed by avulsive movements through the end of the meander lobe, the land remaining in place would have been low and composed of sand.⁴²

The trial court also found that the land which had previously occupied the area shown as bar C on the 1879 map had been completely eroded away and that bar C had formed thereafter as a middle bar as the thalweg moved to the west. The court observed: "If bar 'C' were land-in-

⁴² Barrett described the area in 1867 as follows:

Fractional Township 24 N. R. 11 East, the 6th Principal Meridian, is a low, sandy point, subject to frequent inundations from the Missouri River.

Except a few small cottonwood trees and some willows, there is almost no vegetation upon it.

The Missouri River is constantly changing its banks, so that no permanent corners can be established near the water; indeed, except where there are bearing trees, none of the corners in this Township will probably remain longer than the first high freshet in the Missouri.

Small quantities of coal were deposited in the several mounds as per instructions, but the sandy soil will not prevent it from being washed away.

place which had existed prior to 1879, it would have supported the growth of cottonwoods or other vegetation more substantial than wilows by 1890."⁴³ 433 F. Supp. at 77. Although it is possible that the land represented by bar C may have completely eroded, it is entirely speculative to say that that is what occurred. The record also supports the possibility that bar C, located on the eastern end of the lobe, was the same surface area described by Barrett in his notes and was not built up by accretive deposits. The record is insufficient to prove what actually occurred.

Under defendants' accretion theory bar C would of necessity have been comprised of relatively newly deposited soil since it was located close to the 1879 position of the thalweg. Nevertheless, the record shows that willows were growing on bar C in 1879 indicating, as Dr. McQuivey, a government witness, theorized, that the bar may well have been land in place.⁴⁴ The fact that cottonwoods were not also growing on the bar does not prove the contrary. Bar C, along with bars B and D, was located near the eastern end of the Barrett Survey which Barrett described as sandy soil and frequently inundated. Testimony in the record shows that cottonwoods did not thrive in areas subject to frequent inundation. We find the evidence concerning bar C to be highly conjectural and inconclusive as to whether

⁴³ The 1890 reference is confusing and in obvious error. The area where bar C was located in 1879 is depicted on the 1890 map as "cleared" land.

⁴⁴ The government urges that the vegetation appearing on bar C is inconsistent with the theory of accretion since, if the land had in fact been washed away, it would have been the last of the visible bars to have formed and the last to develop vegetation.

it formed by accretion or was in fact identifiable land in place.

There exists another basic reason why we regard the evidence of the defendants as insubstantial. The opinion of the defendants' experts⁴⁵ that no identifiable land remained in place after the movement of the river sometime between 1875 and 1879 is essentially based upon inferences drawn from the 1879 map admittedly prepared in a 10-day period during the June rise of the Missouri River when the river was as much as five feet above its ordinary high water level. At the time the river was shown to be nearly 10,000 feet wide, whereas in 1875 the bed had been only approximately 800 feet across. Soundings taken at that time demonstrate that a substantial land area was immediately below the surface of the flood water. The defendants do not contend that the river bed permanently expanded to 10,000 feet as shown in 1879; it obviously would be much narrower upon subsidence. See, e.g., the 1890 Missouri River Commission Map, set out as Plate V, *infra*, in which the river is shown to be no more than 3,500 feet wide. The existence or nonexistence of identifiable land in place could not have

⁴⁵ Each of the defendants' experts viewed the existence of identifiable land in place as an essential factor in defining avulsion. Raymond L. Huber, a supervisory civil engineer employed by the Corps of Engineers, stated that

avulsion is the transfer of the piece of land from one bank of the river to the other bank of the river, which occurs in such a manner that you can follow the movement of that transfer of land and identify it as the identical land which formerly existed on the other bank, beyond any power of question.

John F. Kennedy, a professor in the Division of Energy Engineering at the University of Iowa, and director of the Iowa Institute of Hydrologic Research, a division of the University

(Continued on next page)

been accurately assessed at a time when the river's flow was abnormally high during floods which completely inundated the adjacent land. Thus, any inferences drawn from the alleged land forms exhibited on the 1879 map appear to be highly conjectural. Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility.⁴⁶ See *Polk v. Ford Motor Co.*, 529 F. 2d 259,

(Continued from previous page)

of Iowa College of Engineering, defined avulsion as "the river shifting from one side of a block of land to the other leaving the intervening land undisturbed in the process." Finally, Dr. George R. Hallberg testified that:

Avulsion is a term I don't use technically. But from much of my work, what I understand avulsion to mean is a very sudden perceptible movement which would cut off and abandon a river and leave the land contained by that old channel essentially intact.

- 46 Wigmore in his treatise on evidence notes that while one inference may properly be built on another inference, 1 J. Wigmore, *Evidence* § 41 (3d ed. 1940), there is a limit to proof offered in this manner. As an example of the correct method of treating inferences Wigmore quotes from the case of *New York Life Ins. Co. v. McNeely*, 52 Ariz. 181, 79 P. 2d 948 (1938), in which the court observed:

"It is true, of course, that in everyday life, all men frequently act as the result of the repeated piling of inferences upon inferences, and, as a matter of strict logic, if an inference has any probative value whatever in aiding one to determine the ultimate question of fact, it should be considered. The principle which is applied by the average man in his own private affairs usually is that no matter how many inferences are piled on each other, it is only necessary that each successive inference should be more probable than any other which might be drawn under all the circumstances. The Courts, however, have always insisted that the life, liberty and property of a citizen should not be taken away on possibilities, conjectures, or even, generally speaking, a bare probability."

1 Wigmore, *supra* § 41, at 439.

271 (8th Cir.), *cert. denied*, 426 U. S. 907 (1976); *Wilson v. Volkswagen of America, Inc.*, 561 F. 2d 494, 517 n. 65 (4th Cir. 1977); *Padgett v. Buxton-Smith Mercantile Co.*, 262 F. 2d 39, 41 (10th Cir. 1958); *Gilbert v. Gulf Oil Corp.*, 175 F. 2d 705, 709 (4th Cir. 1949).⁴⁷ As this court indicated in *Uhlhorn v. U. S. Gypsum Co.*, 366 F. 2d at 219-20, if land over which a channel changes during abnormal high water periods, inundating all intervening land masses, is identifiable as the same land mass upon subsidence of the high water, the boundary does not change even though the land's surface may be somewhat eroded.

Defendants' experts also relied upon inferences drawn from the existence of remnant channel formations, from the parallel positioning of bars A, B, C and D and their interpretation of applicable principles of hydrology. The record, in our judgment, requires us to give little or no probative effect to the ultimate conclusion reached from these factual premises.

B. Remnant Channels.

The defendants rely on evidence of remnant channels in the Blackbird Bend area as a "common phenomenon" associated with the progressive and gradual movement of a channel as a result of accretion. However, this evidence was proffered only as a possible alternative explanation to

47 Cf. *Logsdon v. Baker*, 517 F. 2d 174, 175 (D. C. Cir. 1975), where the court held that reliance on "brake marks" purported to be visible in photographs but which could not be discerned by the district judge or the appeals court was held to be an inadequate basis for an expert opinion on the cause of an accident since the expert's opinion would be "too speculative."

the plaintiffs' evidence that the remnant channel areas demonstrated avulsive changes in the thalweg.⁴⁸

The evidence further reflects that Dr. John F. Kennedy testified that, as the thalweg shifted to the west, the low energy level of the river in the former channel created by the movement would result in deposition there. The defendants conclude from this that the shift in the river was "a consequence of progressive scour and deposition." The testimony of defendants' expert, Dr. Kennedy, showed, however, that the shift of the thalweg is often the responsible agent for the "subsequent diminished sediment transport capacity of the water." Thus, the testimony is inconclusive as to whether the remnant channel was formed by accretion or avulsion since a remnant chute might also have been formed after the thalweg suddenly and perceptibly moved. In the latter case the deposition forming the remnant channel would be the effect of the low river energy in the area brought about by the sudden avulsive shift of the thalweg rather than a consequence of accretion. As the Supreme Court observed in *Arkansas v. Tennessee*, 246 U. S. at 175,

⁴⁸ The Tribe and the government substantiated their argument that the remnant channels were more consistent with avulsive than accretive movement by presenting evidence of soil samples taken in the area immediately to the east of the Barrett Survey line which showed concentrations of silt and clay in the remnant channels. Concentrations of silt and clay were said by plaintiffs' experts to be inconsistent with the gradual, imperceptible, and progressive action associated with accretion which was said to produce more uniform deposits. The defendants attempted to refute this by testimony that the remnant channel was cut off at the top by formation of a point bar and alluvial deposits would therefore not reach the channel.

if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, *and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion.*

(Emphasis added).

None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstance shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion.⁴⁹

C. Bar Formation.

Just as the remnant channels may have formed as the effect of an avulsion rather than as the result of accretion, the parallel positioning of bars A, B, C and D, while perhaps characteristic of accretion, could have resulted from the accretion which followed as an effect of avulsion as well. Moreover, as we have discussed the actual surface positioning of those bars based on the 1879 map is conjectural since the contours were drawn at the high water stage which existed at that time.

⁴⁹ See *Galloway v. United States*, 319 U. S. 372, 386-87 (1943). Raymond L. Huber, one of defendants' witnesses, conceded that, given the factual basis available to him, he was only able to give an "educated guess" as to what caused the river to move between 1875 and 1879.

D. Captain Friedkin's Experiments.

The final proofs which defendants and the trial court relied on to establish accretion as the cause of the river's movement were Captain Friedkin's experiments and general principles of hydrology. Both Friedkin's experiments and principles of hydrology, however, provide strong evidence that avulsive change may have produced the 1879 movement. Friedkin noted that when a meander bend reaches its limiting width,⁵⁰ as it is conceded Blackbird Bend had here, it does not stop caving its banks. Instead, "[t]he flow short-cuts over the convex bars of bends, chute channels form, and a new bend develops a little farther downstream." J. Friedkin, *Meandering of Alluvial Rivers* 14 (1945) (footnote omitted). Such chute channels⁵¹ are avulsive since the channel moves around or over, not imperceptibly through the interjacent land. One of the defendants' witnesses, Dr. George R. Hallberg, testified that it was quite possible that chutes similar to those described by Friedkin could have formed along the eastern edge of Blackbird Bend, although he felt the area was probably submerged when this occurred. Hallberg's testimony concurred with the government's expert, Dr. Paul McQuivey, a research hydrologist, who testified that, when a river is at high flow it tends to increase its radius, that is, it tends to

50 The limiting width of a meander bend is the maximum distance the river will travel away from the general direction of a river's flow. See J. Friedkin, *Meandering of Alluvial Rivers* 14 (1945).

51 A chute channel is defined as "a channel across a bar or a pointway channel. It differs from a cut-off, wherein a river cuts through a narrow neck which has been developed between the upper and lower arms of a bend." *Id.* n. 1.

take a more direct course rather than a meandering one.⁵² To do so, he continued, the thalweg moves to the inside of the bend, and erodes new chute channels⁵³ through the point bar. Eventually, the record shows, one of the chute chan-

52 Dr. Kennedy, defendants' expert, verified McQuivey's testimony in observing that "[d]uring these extreme inundations, the channel, of course, likes to take a shorter path."

53 The fact that during high water a river's flow tends to move to the inside of a meander bend was substantiated by the defendants' witness Huber who testified:

I will show you an example of a chute cut-off. Take the example of Tieville Bend, which is just below the Blackbird Bend area, below the Barrett Survey—

. . . .

Now, there was a shore chute which had never entirely dried up, had some flow, so that in the high water period of 1943 and later again in 1952 the velocity across this area from the upper end to the lower end of the chute was so great as compared with the velocity around the old bend that it caused some filling of the old channel and it caused a new channel to develop.

Essentially this channel filled up at the upper end to the point that I believe you can walk across it. The lower end is still open, so this would be a chute avulsion.

Huber also pointed out that:

In a very low stage there is insufficient hydraulic energy for the river to cut across any sandbars with the velocity of two or three miles to an hour—two or three miles an hour, I said, so that it has to follow the easternmost high bank. Then as the stage increases up to flood stage, which could be even up to ten miles an hour, a channel will then seek the shorter path across the area, across the bare peninsula, and develop a new channel west, which will be even deeper than the channel against the main bank, for the reason that you have greater bed scar [sic; should read scour], you have greater discharge.

nels becomes large enough to carry the main flow of the river, and the river abandons the old channel.⁵⁴ Cf. *Veatch v. White*, 23 F. 2d at 70.

In addition to the evidence suggesting that the movement of the river in 1879 could have occurred through a series of chute channels, the evidence also supports the possibility that during this same time a cut-off could have occurred across the neck of Blackbird Bend.⁵⁵ Friedkin also described the conditions when a cut-off is likely:

Natural cut-offs occur when a meandering river develops and finally erodes through a narrow neck between the upper and lower arms of a bend. . . . In over 50 laboratory streams in uniform materials not a single cut-off of this type developed. This fact indicates that natural cut-offs result from local differences in the erodibility of bank materials.

With all bends in a meandering river migrating down the valley at the same rate, a cut-off cannot possibly develop. The upper arm of a bend never catches up with the lower arm. For a natural cut-off to develop, erosion on the down-stream bank of the lower arm of a bend must be slower than along the upper arm. Generally, when a cut-off develops, erosion in the bend proper has taken place so that the flow in the lower arm of the bend has become directed up-valley . . . and a narrow neck has developed. It is, therefore, indicated that it is the local differences in

54 McQuivey pointed out several remnant channels in the area of the peninsula.

55 In *United States v. Flower*, 108 F. 2d 298 (8th Cir. 1939), the court found a neck cut-off had occurred only a few miles above Blackbird Bend in 1916 after the river had formed a very wide meander bend.

erodibility of the bank materials in natural rivers which cause narrow necks to form and cut-offs to develop.

Friedkin, *supra* at 16.⁵⁶

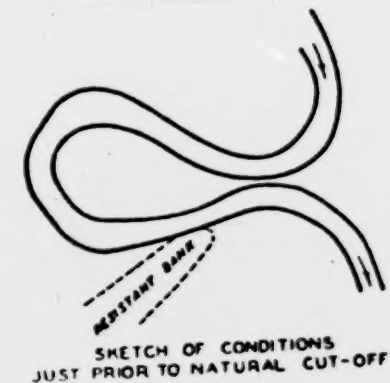
There exists strong corroborative proof of such occurrences from Barrett's field notes made during his 1867 survey. He wrote:

Until very recently, appearances indicated that this point was increasing in size from the deposits and drift of the river; but, during the present season, the river, rising to a great height, partly worked a channel across it, which may, eventually, entirely detach it from the Nebraska shore, rendering it an island in the river.

Tribe exhibit 26E, at 6.

56 Friedkin provides the following illustration of the circumstances which promote natural cut-offs.

DEVELOPMENT OF NATURAL CUT-OFF



Friedkin, *supra* plate 25.

An examination of Tribe Exhibit 96, an 1875 map of Monona County, Iowa, shows a narrowing of the meander bend in the area between sections 29 and 30 which closely resembles Friedkin's sketch.

The evidence also demonstrated that the Iowa south bank of the Blackbird Bend area was composed of erosion resistant material which would have prevented the southerly movement of the meander bend and made a cut-off possible. Cf. Friedkin, *supra* at 16-17.⁵⁷ In addition, the record shows that the potential for breakthroughs in the 1875 through 1879 period was enhanced by high water flows during those years.⁵⁸

57 In the years immediately prior to 1879 the north and south banks of the Blackbird Bend meander lobe had considerably narrowed. Noting this condition, Dr. Robinson testified that:

[F]rom a study of river morphology we can predict that something is about to happen. The river is out of balance with its environment and it's because of this resisted layer at the south that does not allow the classic of the wood where we have homogeneous materials throughout the river to move south.

.

I would predict if I were in a study that there would be a point bar cut-off or a shoot [sic] developed through there that would develop into the main channel of the river and we would have an abandonment of the 1875 channel and the development of a new channel on a shorter and straighter course between the two limbs of the meander.

58 Studies made by the Corps of Engineers received in evidence also lend support to the concept that channels often change location precipitously in both high and low stages. The report reads:

During flood stages the general movement of sand is in a measure arrested on the shoals, and, as a consequence, the low-water channels leading through them are silted up, while new ones are developed which accommodate the high-water flow. As the river falls these latter channels are silted up, and the water ponds up behind the bar until sufficient head is attained to force a breach through the crest at one or several points. . . .

(Continued on following page)

Based on the foregoing analysis we find the factual predicate, supporting defendants' theory as the causative reason for the river's movement, is in large part conjectural and the opinions drawn therefrom must be viewed as speculative. Under the circumstances we hold that the defendants have failed to meet their burden of proof that the significant and marked changes of the Missouri River between 1875 and 1879 were the result of erosion and gradual imperceptible accretion to the Iowa bank.

VII. *The River Between 1879 and 1912.*

In 1881 the highest flood waters of any time since reliable records have been kept occurred on the Missouri River. However, no maps were introduced to show the location of the river between 1879 and 1890. The next map available after 1879 is the 1890 Missouri River Commission map, *see* Plate V, which shows the thalweg to have moved north and somewhat to the east of its 1879 location. Significantly, the river is shown to occupy far less area than that shown on the 1879 map and the land to the east of the

(Continued from previous page)

During the course of the low-water season the main channel keeps shifting from one subsidiary channel to another; these changes of location are often very great, and the uncertainty thereon attendant forms one of the greatest drawbacks to navigation. The high-water channels, before alluded to, are, in the Missouri, of the same general character as those of low-water, but they rarely coincide with them. They are less tortuous as a rule, but not of much greater depth, and they are liable to the same rapid changes of location.

Preliminary Report Upon the Improvement of the Navigation of the Missouri River, in Annual Report of the Chief of Engineers app. S, at 1655 (1881).

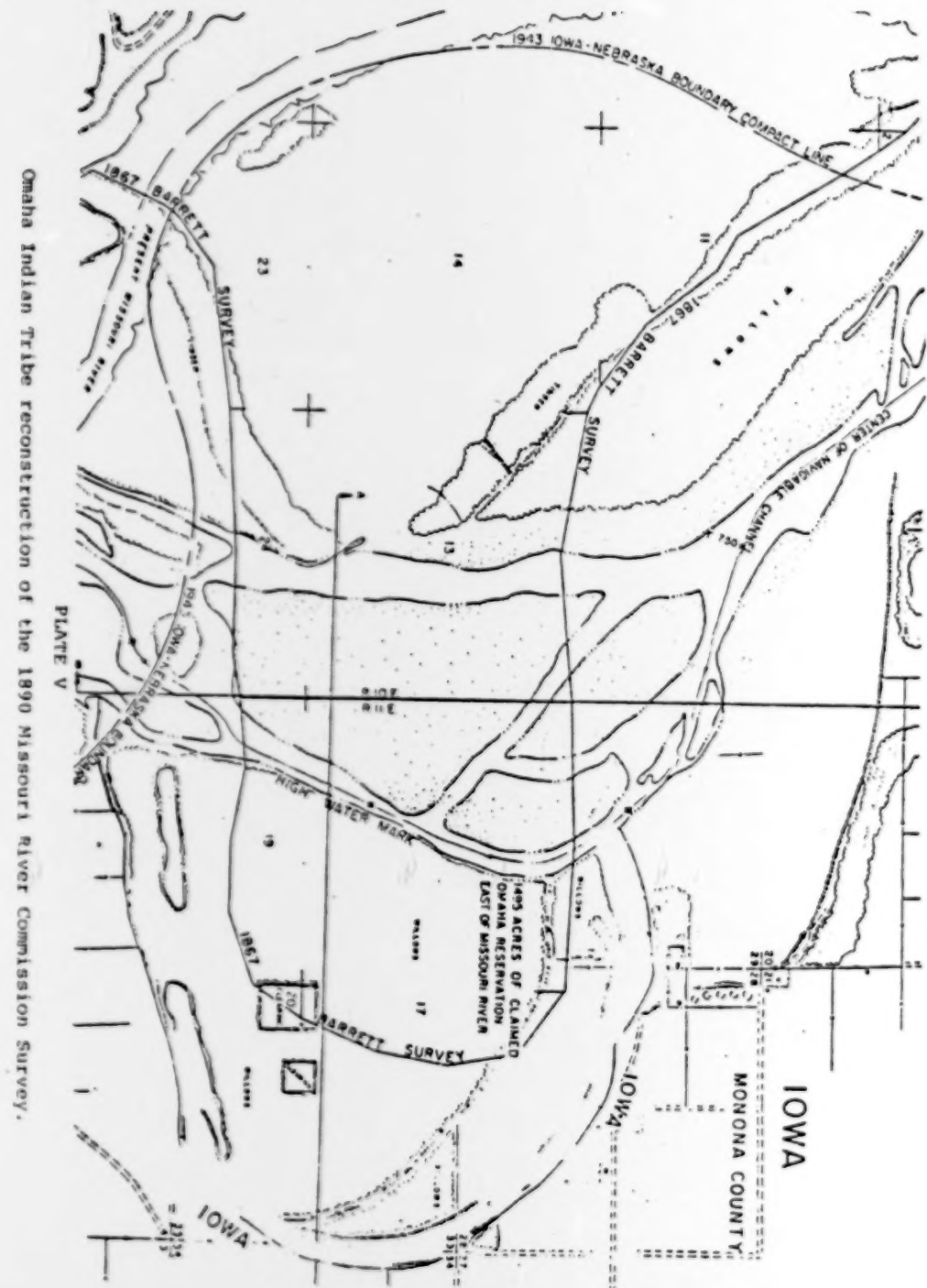
thalweg is shown as stabilized soil with permanent vegetation growing on it.

The trial court felt these facts "simply [show] the normal and logical progression of the accretion which was shown to be forming in 1879" 433 F. Supp. at 79. There exists no factual predicate whatsoever to support this conclusion.⁵⁹

After 1890 the river moved in a northerly and easterly direction to a position shown as the northerly high bank in approximately 1912. *See* Plate III.

We now turn to the trial court's findings and the factual discussion involving the marked change in the course of the river between 1912 and 1923.

⁵⁹ Assuming that the 1890 map shows stabilized accretion land, as the district court found, it is plausible that the "accretion" may have formed from deposition of sediment resulting from a sudden and perceptible shift of the thalweg.



VIII. *The 1912-1923 Movement of the Thalweg.*

The trial court found, again relying upon the defendants' analysis of the evidence, that the 1912 through 1923 movement of the Missouri River was also a direct result of erosion and imperceptible accretion to the Iowa riparian land. The court concluded:

[T]he Court finds that there were no avulsions in the Blackbird Bend area between 1890 and 1923, and that the movements of the river during that period of time were erosive in nature so that accretion was being formed on the side of the river opposite the erosion. The Court finds that after 1890 the river moved erosively until it reached what is now the northerly high bank following which it commenced a southern migration throughout the Blackbird Bend area until it reached its 1923 position. This migration eroded almost all of the westerly end of the land as surveyed by Barrett in 1867 and the deposition which occurred during the southerly migration of the river was accretion to the northerly and easterly high banks and thereby became accretion to the Iowa riparian owners.

433 F. Supp. at 85.

The defendants contend that the river moved in a slow progressive movement south and westward to bring about the remarkable change in the thalweg between 1912 and 1923. Compare Plate III with Plate IV. The basic disagreement between the experts for both sides still exists. The defendants' experts — Hallberg, Kennedy, and Raymond L. Huber — testified that sometime around 1912 the river moved away from the northerly high bank and began to erode to the south depositing accretion material to Iowa riparian land. It was their theory that all of the land in the path of the river was eroded away. On the other hand,

the plaintiffs' experts varied in their appraisal of the river movement during this period. Elmer M. Clark, an aerial surveyor, believed that the river achieved its 1923 position by one or more sudden and noticeable movements of the channel. Plaintiffs' witness, Dr. Charles S. Robinson, a geologist, thought the southward movement occurred suddenly during one high water period in a matter of a few days or months. Dr. McQuivey, the government's expert, felt that the river moved as a result of several avulsive point bar cut-offs.

In reviewing the record, we cannot but echo the words of witness Huber, that it is again only an "educated guess" as to just how the river moved. The extremely speculative assessment of the reasons for the river's movement offered by the defendants is not sufficient to sustain their burden of proof.

The evidence relied upon by the defendants, and the court in reaching its conclusion that accretion caused the 1912-1923 river movement, falls essentially within four areas of discussion. First, the defendants' experts point to evidence of the absence of identifiable land in place. This evidence consisted of testimony from witnesses who had lived in the Blackbird Bend area at the time of the movement that the land on the Iowa side was "new accretion land." Defendants' witnesses also pointed out that there were no geologic or geomorphic formations evident that were typical of avulsive river movement. In addition, the

defendants alleged that no trees could be found which predated the movement away from the northerly high bank.⁶⁰

Second, defendants' experts asserted that a change in the Missouri River above Blackbird Bend altered the angle of approach of the river into Blackbird Bend ultimately producing a southerly migration of the river. In support of this point the defendants introduced in evidence a 1912 survey showing a developing sand bar on the Iowa shore (referred to as the Fairchild sand bar) said to be consistent with a changed angle of entry. The defendants' witnesses also contended that hydrological principles would predict erosive changes in the river as a result of the change of the angle at which the river entered Blackbird Bend. Complimenting this proof were several Indian allotment letters which documented erosion in the northwestern part of the Blackbird Bend meander lobe at a point opposite the formation of the Fairchild sand bar.⁶¹

Third, topographic cross-sections prepared by Dr. Hallberg showed that the land surface gradient in the Blackbird Bend area sloped from northwest to southeast, and that

60 The testimony related to the existence of trees as proof of identifiable land in place was conflicting. Two trees pre-dating the 1912 movement were identified by the Tribe's witness George S. Gorsuch, a forester with extensive experience in dendrochronology (the study of time-span within trees). The defendants contended, and the trial court found that these trees were located on the edge of a sandbar that had allegedly built south of the northerly high bank prior to 1912. However, the contours of the sandbar were never surveyed and its exact location could not have been ascertained.

61 The allotment letters concerned requests by certain members of the Omaha Tribe that their land allotments be exchanged for new allotments because the land originally allotted them was being or had been washed away by the Missouri River.

the land formations in the area were progressively lower in elevation in the southeast. In his opinion, this gradient was compatible with a theory of bar growth on the northeast side of the river as it migrated to the southwest.

Finally, the defendants relied on soil analysis which allegedly revealed findings consistent with the southward and eastward accretive movement of the river.⁶² The government's expert, Dr. McQuivey, had testified that analysis of soil samples taken in the area produced data indicating that the soil becomes sandier as one moves westward in the Blackbird Bend area. Dr. Hallberg utilized this data to theorize that the sandier nature of the western edge of Blackbird Bend indicated that remnant channels had formed behind accretive point bars deposited as the river slowly moved to the southwest.⁶³

Very few acts relating to the actual river movement in the period between 1912 and 1923 are proven on the record. First, it is clear that the thalweg had moved substantially in a relatively short period of time; perhaps as few as three

62 The parallelism of the bars between the remnant channel formations was also relied on to support an accretion theory. We have discussed the speculative significance of the parallelism of land features earlier. See discussion in section VI (C) *supra*.

63 Hallberg stated that the existence of marshy areas and well-defined channel remnants to the east, in contrast to drier areas and less well-defined remnant channels to the west, supported the theory that as the channel shifted away from its bank to keep up with the growing point bar it subsequently backfilled the area creating the remnants.

years,⁶⁴ but no more than 11 years. Second, as the trial court found, substantial high water periods occurred in 1905, 1906, 1912, 1913, 1915, 1916 and 1920. 433 F. Supp. at 83. Third, the angle of approach of the river had changed subjecting land in place to at least surface erosion. Furthermore, substantial erosion was undeniably occurring along the Nebraska shore.⁶⁵ Finally, it is beyond dispute that remnant channel-like formations may be identified by soil samples and aerial photographs. These established facts do not prove that either accretion or avulsion caused the river's movement; the issue remains whether they may form a sufficient factual predicate for defendants' witnesses to conclude that the marked change of the thalweg was a gradual one directly caused by erosion and imperceptible deposition to the Iowa land. We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194.

The expert opinions and the lay testimony indicating that land in place could not be identified in the area are not sufficient to prove that accretion was responsible for the 1912-1923 movement. It is well established on the record that after 1890 as the river moved in a northerly direction alluvion soil subject to frequent inundation was de-

64 The testimony of Ross Willey indicated that the river still flowed in the easterly English Bayou area in 1916. Another lay witness, Judge George W. Prichard, who had traveled the area on horseback in 1919, gave testimony which tends to support the fact that most of the southerly movement of the river had been completed by 1919.

65 A large stand of timber shown in the northwest corner of the Barrett Survey area prior to 1923 was no longer visible in a 1927 aerial survey of the area, indicating the land on which it stood had been eroded.

posited throughout much of the area. Thereafter, when the river moved southwesterly away from the northerly high bank, either by accretion or as the result of avulsion, this sandy area would not reveal any conspicuous identifiable features. The fact that some erosive action occurred in the northwest corner of the Barrett Survey area does not support the inference that accretion was the primary cause for the movement. As we have noted earlier, erosion may readily occur along with avulsive movements of a river; the two phenomena may often take place together. Under the circumstances the absence of identifiable land in place has little probative value in determining whether erosion and accretion were in fact the responsible elements for the 1912 through 1923 movement of the river.⁶⁶

Aside from the inconclusive evidence relating to identifiable land in place, little can be found in the record that supports the defendants' position. The fact that the river changed its angle of approach does not in itself support an inference that accretion was responsible for the changed movement of the thalweg. Although the change may have altered the erosion patterns in the Blackbird Bend area, it is still a tenuous conclusion at best to infer from this that the thalweg moved imperceptibly. While reasoned deductions may be made from probative facts, the ultimate conclusion may not rest on mere guesswork. Similarly, as in

66 The absence of trees in the area north of the Barrett Survey does not support an inference that the land had been completely eroded by the river's southwesterly movement. Depending upon the nature of the river's northerly movement, all trees growing in the area prior to 1912 may have been washed away. In addition, the record indicates that many of the trees growing in the area after 1923 were cut for firewood in the 1930's.

the 1875-79 river movement, the sand bars and the gradient of the land could have just as easily occurred from deposition resulting from low river energy caused by avulsive movements of the river as by a gradual shift or movement of the thalweg.

The little solid scientific evidence in the record contradicts the defendants' theory of how the river moved. Soil samples taken in the area by government experts⁶⁷ corroborate Dr. McQuivey's testimony of the existence of four major channel remnants.⁶⁸ Aerial photographs made in 1925 also indicated the channel remnants in the area. Although the defendants presented an alternative theory of how the remnant channels might have formed, their existence is strongly probative of the government's

67 The government had performed extensive soil analysis of the Blackbird Bend area. On government exhibit 151, which summarized the results of that analysis, the government's experts depicted those areas within the Blackbird Bend area where the soil samples indicated remnant channels, and those areas where the soil samples indicated bar-like formations.

68 These soil samples point out the existence of the remnant channels. McQuivey, the government's expert, testified that:

Looking at Sample 61 and 56, 61 was silt on the top. There was some fine, very fine sand down to a depth of four feet, and then down to a depth of approximately twenty feet was soil clay. That is an indication of an old channel-type deposit, where the water has not been running in, and it's an area of back water or slack water to where the silts and the fine clays can be settled out.

So basically, we can determine from the soil samples if there was an old channel there.

The defendants' witness did not dispute the validity of the soil samples but, instead, presented only alternate theories as to how possibly the non-alluvion soil was deposited.

theory that the river migrated from the northerly high bank to its 1923 position by a series of four point bar cut-offs.

We conclude on the basis of an overall review of the record that it is entirely speculative to determine when or how the thalweg moved to the position shown on the 1923 map.

IX. Conclusion.

The district court's ruling, adopting the defendants' theory of their case, depends on the assumption that the doctrine of avulsion is not applicable without evidence of identifiable land in place. On the record presented we deem this an erroneous legal assumption. When considered in the context of the broader parameters of avulsion we hold the defendants' case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194.⁶⁹

69 How the river reached its outer eastern limit in 1875 or moved to its most northerly point in and around 1912 is outside the confines of this case. The Tribe contends erosion and accretion were responsible for these movements and there exists statements in the briefs in which it appears that the defendants have conceded this to be true. However, any such concession may have been predicated on an erroneous view of the law and should not be deemed binding under the circumstances. In using the word "accretion" in the context of the easterly movement from 1875 to 1879 and of the northeasterly movement from 1890 to 1912 we

(continued on following page)

We recognize that to require the defendants to prove the cause of the river's movement occurring some 100 years after the event is indeed an onerous burden. This may seem to be an injustice when one considers that the defendants or their predecessors have possessed and continuously farmed the land without protest for nearly 40 years. However, as the trial judge observed in a letter written to counsel after trial, divesting the Omaha Indian Tribe of their original reservation land promotes an equal injustice.

While burdening either side in this case with proving the movements of the river occurring many years ago may result in undesirable hardships, the clear policy of the federal government mandates that the interests of the Omaha Indian Tribe be given their historical and statutory protection. These important possessory land interests cannot be taken away on proof that is basically speculative and conjectural.

The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment quieting title in the trust lands involved in this

(Continued from previous page)

understand the defendants as merely saying that there has been deposition of land added to the Barrett Survey area. This land is all outside of the Barrett Survey and beyond the limits of the reservation established by treaty in 1854. The application of § 194 placing the burden of proof on the defendants in the present litigation is not controlling as it affects the area outside the original reservation. We do not in any way attempt to prejudge the several claims; nor do we foreclose the right of the plaintiffs to urge that § 194 is applicable under different proof. We simply note that the same proof showing presumptive title (Treaty of 1854) to the reservation cannot govern any future litigation concerning the lands outside that area.

action⁷⁰ in the United States as trustee, and the Omaha Indian Tribe; the prior orders relating to escrow funds and accounting procedures governing the 2,900 acres within the original boundary of the Barrett Survey as originally ceded to the Tribe in the Treaty of 1854 are ordered dissolved.⁷¹

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

70 The government excepted from its complaint any claim to approximately 400 acres of land within the Barrett Survey which may have been allotted to individual Indians and subsequently patented to non-Indians. Any current claims to those lands by the Tribe might be affected by issues of adverse possession and laches. We therefore remand to the district court those claims related to the land excepted from the government's complaint for a determination on the above mentioned issues.

71 Plaintiffs question whether the trial court's judgment was final since it lacked certification under Fed. R. Civ. P. 54 (b). The claims here on appeal were severed from claims to land outside the Barrett Survey, asserted in C-75-4067, by order of Judge McManus. The severed claims in C75-4067 had been previously joined with quiet title actions pertaining only to the 2,900 acres of land within the Barrett Survey filed by the United States in C75-4024 and by the Tribe in 75-4026 which are on appeal here. Thus, the district court settled all of the questions of ownership involving the lands within the Omaha Indian Tribe's original 1854 reservation boundaries. Under the circumstances we view the severed claim in C-75-4067 as a wholly separate action which had been joined with the quiet title suits so that the judgment entered by the district court resolved the entire controversy then before it. Rule 54 (b) therefore, has no application since all, not "fewer than all of the claims," before the trial court were resolved by its judgment.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Filed:

Sioux City Office, Western Division, Northern
District of Iowa, May 4, 1977, 2:50 P.M.
K. W. Fuelling, Clerk; By: D. Henry, Deputy

No. C 75-4024

UNITED STATES OF AMERICA

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, organized Indian Tribe
pursuant to Act of June 18, 1934
(48 Stat. 984) as amended,

Plaintiff,

vs.

HAROLD JACKSON and OTIS PETERSON and the
DISTRICT COURT OF IOWA IN AND FOR
MONONA COUNTY,

Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, etc.,

Plaintiffs,

vs.

AGRICULTURAL INDUSTRIAL INVESTMENT
COMPANY, et al.,

Defendants,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The above-entitled actions, consolidated for purposes of trial, as to title to lands within the Barrett Survey Area of the area known as Blackbird Bend, came on for trial in the United States District Court at Sioux City, Iowa, on the 1st day of November, 1976. From the evidence submitted by the respective parties, and upon the entire record, the Court now makes the following:

FINDINGS OF FACT

I.

Nature of the Action and the Parties

1. These consolidated actions are lawsuits commenced by the United States of America and the Omaha Indian Tribe seeking injunctive relief and a judgment quieting title to land situated in the State of Iowa, Monona County, east of and adjacent to the Missouri River. The defendants are various entities, and individuals, who also claim title to the land in dispute and seek to quiet title in their names. The basic issue, as tried to this Court, involves how the river moved over the span of a century from the mid-1800s to about the mid-1900s, and whether the land herein involved was added to Iowa riparian land by accretion or, whether the river moved by avulsion leaving the original identifiable land in place.

2. United States of America, plaintiff in Civil No. C75-4024, derives its interest in this litigation as a Trustee for the Omaha Indian Tribe and their reservation lands reserved to the Tribe pursuant to the Treaty of 1854.

3. The Omaha Indian Tribe, plaintiff in Civil Nos. C75-4026 and C75-4067, is a duly organized body corporate, established pursuant to its Constitution and By-laws having been approved by the Secretary of the Interior as provided by law. Pursuant to its Treaty dated the 16th day of March, 1854 (10 Stat. 1043) with the United States of America, there was established the Omaha Indian Reservation in the then territory of Nebraska.

4. In 1867 the said reservation boundary was surveyed for the General Land Office of the United States Government by T. H. Barrett, Surveyor. Barrett meandered the Nebraska, or right bank of the Missouri River where it adjoins the Omaha Indian Reservation in the course of conducting his survey. The Reservation boundary, as originally established, was the thalweg of the Missouri River. Thus the Barrett Survey lines were not actually the boundary of the Omaha Reservation where it adjoins the River. See *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808 (1891). The said 1867 General Land Office Survey shows the Blackbird Bend of the Missouri River flowing east, south and west on the north, east and south sides of a meander lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa. The area east of the Iowa-Nebraska 1943 Compact Lines bounded by the said Barrett meander line will be referred to herein as the Barrett Survey. The area including the Barrett Survey Peninsula but extending to the Iowa high bank, north, east and south of the Barrett Survey, will sometimes be referred to as the Blackbird Bend area. These findings and conclusions pertain only to the Barrett Survey Area.

5. Of the numerous defendants in all three lawsuits, the only defendants involved in this trial are those claiming an interest in the approximately 2900 acres within the 1867 Barrett Survey. These defendants are Roy Tibbals Wilson, landowner, RGP Inc., landowner, Otis Peterson, tenant of RGP Inc., Harold Sorenson, landowner, State of Iowa, landowner, and Travelers Insurance Company, mortgagee of RGP Inc. The 1867 Barrett Survey and the location of the defendants' land within that boundary, are set forth in Exhibit T78.

6. The Tribe's pleadings acknowledge that these landowner defendants, or their predecessors in title, have had possession of the disputed real estate for at least 40 years.¹ During this period of time, a substantial portion of the land was cleared of trees, leveled, fenced, drained, roads built, and cultivated. It is now a valuable and productive tract of farm ground, as evidenced by the purchase of 2180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at \$1,685,000, approximately 1780 acres of which is within the Barrett Survey and the subject of this trial.

7. On April 2, 1975 the Omaha Indian Tribe seized possession of the land within the Barrett Survey before institution of this litigation, and up until June 5, 1975 maintained said possession without the approval or consent of any of the defendants herein. On June 5, 1975, Judge McManus granted a preliminary injunction to the Tribe and Government permitting the plaintiff Tribe to

¹ See paragraphs 30 and 31 of Tribe's Complaint in Civ. C 75-4067.

continue its occupancy of the land within the Barrett Survey during the pendency of this action and subject to certain accounting requirements pertaining to the crops. Numerous issues and problems relative to this temporary occupancy, the crops, and access rights developed but are not dealt with directly herein and many are hereby rendered moot.

II.

Subject Matter of This Trial

8. By the Order of Judge McManus dated April 5, 1976, a portion of the issues and land involved in all three lawsuits was consolidated for this trial. Approximately 8000 acres of land claimed by the Omaha Indian Tribe in C75-4067 and all issues of damages were severed. The severance of the Barrett Survey Area from the other claims of the Omaha Indian Tribe was necessary because the Barrett Survey line is the only clearly ascertainable line of demarkation, and was the boundary of the area of which the Tribe received possession by virtue of a preliminary injunction entered June 5, 1975. Thus as to the Barrett Survey Area the action was construed as an equitable quiet title action, and the demands of various defendants for a jury trial were denied as to that area. As to lands claimed by the Tribe outside the Barrett Survey Area, the action was treated as a legal action for ejectment, in which defendant's demands for a jury trial may be sustainable. This left the 2900 acres within the Barrett Survey as the subject matter of this trial since the dispute over that land is common to all three lawsuits.

9. By the Treaty of March 16, 1854, the Omaha Tribe of Indians ceded to the United States all their lands west of the Missouri River, except for certain lands reserved to the Tribe. Pursuant to this Treaty, the Tribe selected a tract of land known as Blackbird Hills to be the Omaha Indian Reservation, which includes the present day Omaha and Winnebago Reservations. The Reservation was thereby established in May of 1855. The thalweg of the Missouri River was constituted the common boundary between the Omaha Indian Reservations and the State of Iowa.

III.

Claims of the Parties and the Issues

10. The Government in C75-4024 alleges that it holds title in trust for the Omaha Indian Tribe to all those lands now lying within the Barrett Survey, approximately 2900 acres, and extending to the center of the main channel of the Missouri River as it existed when the Reservation was created. From this 2900 acres, however, the Government's Complaint excepts any claim for certain lands allotted to individual members of the Tribe and sold to non-members amounting to approximately 400 acres.² The Government seeks a preliminary injunction maintaining the Omaha Tribe and its members in possession of these lands until the case is decided; a judgment quieting title in the United States as Trustee for the Tribe; and, a permanent injunction against the

² See Government's Answers to Interrogatories Nos. 1 and 2, executed on March 8, 1976. It should be noted, however, that the Tribe's Complaints do not so except these 400 acres from their claims.

prosecution of state actions by the defendants relating to these lands.

11. The Government's theory is that the land within the Barrett Survey in 1867 was cut off from the rest of the Reservation through avulsions caused by floods on the Missouri River; the avulsive changes which cut through the ox-bow bend began shortly after the Barrett Survey in 1867 and occurred at numerous times thereafter up until the 1940s when the river was stabilized; and, that each such major move to the west was a sudden shift, which constituted an avulsive change as distinguished from the slow eating away of the banks through erosion.³

12. The Tribe in C75-4026 alleges that it is in peaceful possession of the land within the Barrett Survey; that the United States holds the subject lands in trust for them under the Treaty of 1854; and seeks a stay of certain state district court orders pertaining to the occupancy of the land and a preliminary and permanent injunction maintaining the Tribe in possession. In C75-4067, the Tribe filed suit against numerous defendants claiming title to the entire Blackbird Bend area, some 6000 acres of land, and also claiming two bends in the river to the north containing approximately 5000 additional acres. The Tribe alleges that it holds title to the subject land pursuant to the Treaty of 1854; that the adverse claims of the defendants, who have illegally and wilfully trespassed upon the land for approximately 40 years thereby preventing the Tribe's occupancy, are null

³ See Government's Answer to Interrogatories, Nos. 4, 5 and 11, executed on March 8, 1976.

and void; and seek essentially a judgment quieting title to all the land in the Tribe, the restoration of possession to it, and damages for \$50,000,000 for illegal trespasses.

13. The Tribe's theory is that between the time the Treaty was signed in 1854 and 1867, when Barrett made his survey, the river moved eastward by erosion and added to the size of the meander lobe by accretion. After 1867, the Tribe contends this migration eastward continued until 1875 when the easterly high bank, which is apparent on the land today, was created representing the farthest eastward progression of the river in the Blackbird Bend area. Then, the Tribe further claims that sometime between 1875 and 1879, the river suddenly and perceptibly by avulsion, departed the main channel of 1875 to the 1879 channel to the west permanently severing a substantial acreage of the Reservation from the right or west bank of the Missouri River including a portion of the land within the Barrett Survey, and thereafter the Missouri River flowed within the boundaries of the Reservation. After the claimed avulsion between 1875 and 1879 the Tribe contends the river moved north from the 1867 Barrett Survey line eroding as it proceeded and increasing the size of the Reservation by accretion just as the river did in its easterly movement. The Tribe next asserts between 1908 and 1912, the river reached the northerly high bank, which is also visible on the land today, and sometime thereafter departed by avulsive movement to the south like the claimed avulsion from the easterly high bank. The Tribe, therefore, concludes that these avulsions left Omaha Indian Reservation land in place.⁴

⁴ See Tribe's Proposed Findings of Fact and Conclusions of Law executed October 24, 1976.

14. The defendants in their Answers deny that the lands involved in these suits are a part of the Omaha Indian Reservation but claim title and the right to possession is theirs and seek a judgment quieting title in their names, along with other injunctive relief, by way of counterclaim. Affirmative defenses are also raised in their Answers based upon the statute of limitations, adverse possession, laches, estoppel, abandonment and acquiescence, and general equitable considerations. The Tribe, however, sought and obtained a summary judgment by Judge McManus on these affirmative defenses before trial and while the defendants still assert their applicability they are, therefore, not in issue at this stage of the proceedings.

15. Defendants' theory is that the land within the Barrett Survey was washed down the river and replaced by new land which accreted to the east or Iowa bank. They contend that the eastern approximately one-half of the Barrett Survey peninsula was a low sandy point in 1867 subject to frequent inundation and easily erodable.* After 1852, the meander loop of the River moved eastward until, sometime prior to 1875, it reached its limiting width, and its easternmost position in the locality here in issue. Thereafter, the meander loop commenced a gradual migration to the west and south until by 1879, it had eroded away almost all of the "low sandy point," and had commenced a process of accretion to the eastern and northern Iowa bank in the areas it had occupied sometime prior to 1875. Accretions were gradually added to the left or Iowa bank of the river and by 1890 a

5 See Barrett Survey Field Notes, Exhibits T26 (d) and (3).

stable land mass had been created and added to the Iowa riparian land. In 1890, the river in the Blackbird Bend area was relatively straight, but the river again started to work itself into a meander bend to the north, which bend then began to migrate downstream in the classic manner through the Blackbird Bend area and the land then situated within the Barrett Survey, until by 1927 the bend had migrated entirely through the area formerly occupied by the 1867 peninsula washing away all the land in its way on the Nebraska or right bank and depositing new land on the Iowa or left bank. Between 1927 to 1943 the river moved westerly to the Iowa-Nebraska 1943 compact line completing the accretions to the Iowa bank which form the subject matter of this lawsuit.

16. The question before this Court for resolution is, therefore, how the river moved between the middle 1800s to the middle 1900s, and specifically whether the land now within the Barrett Survey line was formed as the result of accretions to Iowa riparian land or, alternative, whether it is Omaha Indian Reservation land presently identifiable as being left in place by an avulsion or avulsions.

IV.

Discussion of Evidence and Resulting Findings of Fact on the Merits*

To aid in the task of making Findings of Fact, the Court makes the following discussion of the evidence:

*All references to the transcript shall be in parenthesis with the transcript page first followed by the line where the testimony may be found.

A. INTRODUCTION

It is appropriate at this point to identify the nature of the river with which this case deals. During the period from 1854 until at least the early 1940s the Missouri River can best be described as in a wild and uncontrolled state. As described by Major C. R. Suter in APPENDIX S, of the annual report of the chief of engineers for 1881 (Exhibit T65; W-XX) on page 1650:

" . . . Its most salient and striking features are the remarkable impetuosity of its current, and its slope, which is considerable for so large a stream. The rapidity of the current and the general instability of the banks and bed give rise to the excessive turbidity of its waters, which have earned for it the title of the 'Big Muddy.'"

And on page 1651:

" . . . The April rise is generally the most destructive, for it shows, for a time at least, a tendency to follow the channels developed during the low water season proceeding, and, as a consequence, the banks are attacked with extreme violence. When the June rise comes the bed is in a measure shaped for its reception by the preceding flood, and the water passes off with somewhat less destructive results. Both, however, have sufficient power to produce tremendous effects and bring about the most astonishing changes."

And finally on page 1652:

" . . . Bank erosion to the extent of 2,000 feet per annum, over long distances, has been noted, and to a greater or less extent it is constantly going on, even during low stages. The enormous amount of material thus precipitated into the river, together with that scoured from the bed, causes the formation of innumerable bars, which, even at high water,

obstruct navigation. These bars are constantly in motion, their position and shape changing from day to day. The channels through them are also changing both in depth and location, rendering navigation correspondingly uncertain. Owing to the incessant bank erosion the river is steadily increasing the width between high banks, as the bars which are formed opposite caving shores take time to build up to the general level and are meanwhile liable to be themselves attacked and swept away. The erosion *which usually occurs on the upper sides of points* causes these points to move bodily downstream. Where the erosion is more rapid than the bar growth below, the point disappears and the river's course is detrimentally straightened . . ." (Emphasis supplied.)

The Missouri River was in this period an alluvial river. This means that flow of the river itself makes the geometry of the channel (2902:4-16). During this period it carried large sediment loads because of the runoff from relatively barren lands adjacent to its boundaries (2903:1-11). These large sediment loads created tremendous erosive power (1498:20). Therefore, the flow itself makes its boundaries and the character of the flow is in turn influenced by the nature of its boundaries (2929-2931). It was a river that can best be described as in a state of constant change and movement except during periods of relatively low flow.

Because of the high quantity of sediment transported by the Missouri River during the period in question, the channel tended to meander or become sinuous, rather than flowing in a straight course (2915:1-12). It is generally accepted as a fact by all of the witnesses that the sinuosity or meanders of the river likewise tended to migrate downstream during the course of various periods

in time (900:5; 2076:17; 2574:18-2575:11). Therefore the channel of the river was constantly moving and changing its primary or principal course (1538:14). This resulted in erosion of certain land by the movement of the main channel of the river and deposition of sediment being carried by the waters which usually took place opposite where the erosion occurred (311:23; 839:20; 900:5; 1479:11; 2027:9; 2974:11-2948:4). This oftentimes left certain landforms remaining such as sloughs, bayous, lakes, dunes, sandbars and other topographical irregularities which can be geologically identified. Exhibits G154 and Exhibit W-8.) Of additional significance is the nature of the soils which can be presently identified today, these soils consisting primarily of medium to fine sands, silts and clay which are not cohesive and easily erodible (2586:25-2587:16). These are the soils which would be typically found in an alluvial floodplain as being deposited during the course of river migrations.

B. DEFINITION OF TERMS:

This Court has prepared and filed a memorandum opinion which analyzes and discusses the difficult choice of law questions presented in this case, as well as the definition of the terms accretion and avulsion. Reference to that memorandum opinion should be made for complete definitions which this Court has applied in arriving at these findings. However, it may generally be said that the various jurisdictions apply definitions of the processes of accretion and avulsion which are substantially similar. For purposes of clarity in these findings, this Court will apply the following general definitions:

(1) "Accretion" results from a gradual and imperceptible addition to the shoreline by action of the water to which the land is contiguous. The action of the water deposits silt and sediment which becomes accretion land. It may occur slowly or rapidly from the action of the river, but it is additional land which cannot be identified as having existed in its present location prior to a change in the location and course of the river which it abuts. When a river moves its course and location through the process of accretion, it has eroded away one of its banks and made depositions of silt and sediment against the opposite bank. The process of erosion destroys land on the bank opposite the accretion deposits by washing it away. The accretion deposits are at least partly composed of land which has been eroded away upstream, and carried downstream by the river in the form of silt until it is deposited against one of the riverbanks.

(2) "Avulsion" is the sudden shifting of the channel of the river and a body of land must be cut off so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed. It is a sudden and rapid change in the channel of a stream where the old bed is abandoned and a new bed is formed in such a manner as to not destroy the integrity and identity of the land between the old and the new channels. Thus a primary distinction between accretion and avulsion is that avulsion does not erode away and replace by deposits of silt the land between the old and new channels.

(3) "The high bank" is a presently existing identifiable land feature of a higher elevation than the re-

mainder of the floodplain in Blackbird Bend and represents the most northerly, easterly and southerly erosion by the Missouri River during the period in question in this case.

(4) "The right bank" is the Nebraska or most westerly bank of the river at any given point in time during the period in question.

(5) "The left bank" is the Iowa or most easterly bank of the river at any given point in time during the period in question.

(6) "The thalweg" is the center of the navigable channel of the river at any given time. It is not necessarily the "thread" of the river which is considered to be the line midway between the banks at the ordinary state of the water without regard to the location of the thalweg.

The dispute in this case is almost entirely factual and, to a large extent involves the interpretation of documentary evidence, i.e. maps and supporting documents between the period of 1852 until 1940, inasmuch as most of the witnesses living during that time have died. Only a few witnesses were still alive who observed the river in the early 1900s. Therefore, it becomes necessary to detail the evidence available during certain periods of time in order to resolve the conflicts as between the claims of the plaintiffs and those of the defendants.

C. THE MISSOURI RIVER BETWEEN 1852 AND 1879.

1. *1852-1867.* This period of time in history is of limited significance to the Court. The information that can be gleaned from the surveys and maps made during that period is somewhat limited. Since the instant case involves only title to land within the 1867 Barrett Survey, the actions and locations of the Missouri River within the period 1852 and 1867 have not created or caused a boundary dispute. Thus a discussion of the information between 1852 and 1867 is useful for purposes of background only. The first known survey was a left bank survey in 1852 by Deputy Surveyor Anderson of the General Land Office (Exhibit T22a-g). In 1855, following the treaty with the Omaha Tribe, Deputy Surveyor Barnum, General Land Officer surveyed the boundary of the Omaha Indian Reservation (Exhibit T8 and T8a). Neither Anderson nor Barnum surveyed the river or the opposite bank of the river in 1852 or 1855. In 1855 and 1856 a reconnaissance map of the river was prepared by Lieutenant G. K. Warren (Exhibit T23). In 1857 and 1858 a "tie" survey as between Iowa and Nebraska was performed by General Land Office Deputy Surveyors Hopkins and Haddock (Exhibits T25 and T25a-c, and Exhibit W-E3). In 1867 General Land Office Deputy Surveyor Barrett surveyed the right bank of the river (Exhibit T26, T26a, W-G3, H3 and I3). Once again this survey provides no information as to the left bank at that time or the width of the channel of the river at the time that survey was made. The Barrett survey was conducted during the months of April and

May. In the area in question the Barrett line is only a meander line following the outline of the bank of the river as it existed during April and May of 1867. As noted above, it did not purport to establish the boundary of the Reservation in the area in question, since the boundary was the thalweg of the river. See *Harden v. Jordan*, 140 U.S. 371, 11 S.Ct. 808 (1891). Nevertheless, the location of the Barrett meander line can be established, and thus the line provides the only clearly marked line which can be used by a fact-finder as a basis to adjudicate boundary disputes. In fact, the Barrett line was used by the Court to limit and define the area of which the Tribe was granted possession in the preliminary injunction of June 5, 1975. For these reasons, and the procedural dilemma created by the fact of the Tribe's possession of the Barrett Survey Area discussed above, the trial of this case was limited to the Barrett Survey Area, and these findings and conclusions are also so limited. During that same year and after the Barrett survey, a map of the Missouri River was made by Colonel J. N. Macomb (Exhibit T27). The Macomb map was compiled from sketches by Captain C. W. Howell of the Corps of Engineers and by Missouri River pilots and others. Exhibit T95 is a composite map showing the Barrett survey of 1867 and the Macomb map readjusted by the witness Clark to fit the survey by Barrett. Plaintiffs concede by their testimony that the measurements are not accurate as far as distances on the Macomb map are concerned (210:23) and therefore the reliability of the composite Exhibit 95 is subject to some question. The defendants take these same maps and by the use of mylar overlays superimpose them upon

a base map of the Blackbird Bend area (Exhibits W-P7, R7, S7, T7, U7, and V7). The obvious differences between the adjustments made by the plaintiffs on Exhibit 95 and the defendants' mylars makes it impossible for the Court to reconcile the correctness of the interpretation of either side. Since this case is only concerned with the Barrett Survey Area, and since there is no dispute that the river was east of the Barrett line, disputes over the precise location of the Missouri River channel and thalweg as of 1867 have little significance in this case. The admitted distance inaccuracies on the Macomb map by the plaintiffs likewise makes their composite Exhibit 95 somewhat suspect in the mind of the Court. Therefore, the only real conclusion that the Court can make about the movement of the river between 1852 and 1867 is that there has been an eastward migration of the right bank meander lobe during this period of time with the river eroding against the left bank and accretion taking place on the easterly tip of the meander lobe as surveyed by Barrett. This is evident from the "low sandy point" as shown on the Barrett survey which encompasses about the eastern mile or more of the meander lobe. Barrett's field notes (Exhibit T26E) indicates this is an area which is very low and sandy and subject to frequent inundation.⁶ It is significant to note

⁶ Barrett Field Notes, General Description, Exhibit T26E, P. 520: "Fractional Township 29 N. R. 11 East the 6th Principal Meridian, is a low, sandy point, subject to frequent inundations from the Missouri River. Except a few small cotton wood trees and some willows, there is almost no vegetation upon it. The Missouri River is constantly changing its banks, so that no permanent corners can be established near the water; indeed, except where there are bearing trees, none

(Continued on next page)

at this juncture that the expert witnesses produced in the trial of this case almost unanimously agreed that accretion land will form originally as point or middle bars; these bars are low and sandy, unstable, vegetation free and when subject to inundation are easily erodible. (824:13; 844:7; 2586:25-2686:16; 2017:17).

That the easterly end of the Barrett meander lobe as surveyed was accretion is not seriously disputed by anyone. The maps and the evidence likewise reflect that during the period from 1852 until 1867 there was some southerly migration by the river which, under normal circumstances, would result in formation of some accretion on the opposite or northerly side of the river which would be accretion to the left bank (311:23; 839:20; 900:5; 1479:11; 974:14).

2. 1867-1875. In the nine-year period between 1867 and 1875 there are no maps or surveys introduced in evidence which show the location or movement of the river during that period. However, from the Onawa Iowa Public Library there was introduced in evidence an historical atlas printed by A. T. Andreas in 1875 which purports to show the left bank of the river at or about that time (Exhibits T28 and W-L13). The reliability of the date and the accuracy of the atlas are questionable in view of the lack of information as to the source from which the atlas was made and the date of said source. It is

(Continued from previous page)

of the corners in this Township will probably remain longer than the first high freshet in the Missouri. Small quantities of coal were deposited in the several mounds as per instructions, but the sandy soil will not prevent it from being washed away."

apparent that during the period between 1852 and 1875 the river did move easterly, eroding the Iowa or left bank as it moved. Because this case is limited to the Barrett Survey Area, this Court will make no effort to pinpoint the location of the river during this period, and makes only a general finding that the river had moved to some point east of the Barrett line during the years 1852 to 1875 by the process of erosion and accretion.

3. 1875-1879. This then sets the stage for the first area of principal dispute as between the parties. In 1879 the Missouri River Commission (forerunner to the U. S. Corps of Engineers) surveyed the Missouri River in the Blackbird Bend area (Exhibits T29, W-M3 and W-N3). Careful examination of the original survey maps shows the river width within the Barrett Survey at that time to be about 10,000 feet in width when measured from east-west. The 1879 map shows a crescent shaped bar immediately west of the easterly high bank which has been labeled on some of the exhibits as bar "A" (Exhibit W-N3). Westerly thereof is another crescent shaped bar which has been labeled as bar "B". The map makers have indicated by a common map making symbol that there is some willow vegetation on bar "A" but bar "B" appears on the map as simply a vegetation-free sandbar. Immediately west of bar "B" is a small "tear-shaped" bar which has been labeled as bar "C"—the map shows this bar has willows growing thereon. North and west of bars "B" and "C" is a series of sandbars which have been variously described by witnesses as having the appearance of a "fishbone"—these bars, like bar "B" are likewise vegetation-free.

It is the claim of the plaintiffs that between 1875 and 1879 the river was flowing against the easterly high bank and that between 1875 and 1879 an avulsion or avulsions took place and that the river abandoned its 1875 bed and by one, or two or more avulsions (291:17-Clark); or by one avulsion, probably in 1879 before June, 1879 (1161:9-14-Robinson); or by several major jumps (1502:8-McQuivey), and established its bed in the 1879 position.

The defendants on the other hand claim that the river moved after 1867 to its 1879 position by gradual erosion south and westward against the meander lobe as surveyed by Barrett in 1867 with deposition occurring on the opposite side of the erosion resulting in the formation of bar "A" as an accretion bar joined to the Iowa riparian land in Section 29, Township 84 North, Range 46 West and becoming later attached to the Iowa riparian land in Sections 28 and 34, in Township 84 North, Range 46 West (2603:13-2604:23; 2939:4-2944:5). The defendants point to certain facts to support their claims which the Court believes are relevant and logical:

(a) The vegetation on bar "A" as shown by the exhibits is willows. Willows are the first vegetation to appear as sandbars are formed because they will grow on sandbars that are subject to frequent inundation whereas cottonwoods need higher and drier land before growth is established. Willows will start to grow within one to two years after the bar surfaces (1390:20). This indicates therefore that bar "A" was of fairly recent origin and was not land in place left as the result of a sudden avul-

sive movement by the river. No witness for the plaintiff claims that any part of bar "A" is presently identifiable as land which was left in place following an avulsion (1660:20-1661:20; 1020:12-1022:10).

(b) Plaintiffs theorize that in 1875 the river was flowing against its easternmost bank, and was at that time a channel more than 800 feet wide. *Omaha Indian Tribe's Proposed Findings of Fact and Conclusions of Law*, 38, *Finding No. 19*. They further theorize that, in 1875, the river abandoned this 800 foot wide channel in an avulsion. *Id. at 39, Finding No. 22, et seq.* Yet Tribe's Exhibit 99 locates bar "A" at a distance of much less than 800 feet from the easterly bank depicted there. This inconsistency supports this Court's finding that bar "A" is not "land-in-place" which was, prior to the 1879 river change, a part of the Blackbird peninsula on the Nebraska side of the river. Bar "A" as mapped in 1879 by the Missouri River Commission appears to be entirely composed of sand and willows. A remnant chute channel is shown on the exhibits as existing between bar "A" and the easterly high bank. The plaintiffs acknowledge that the width of that channel remnant is too narrow to be the width of the 1875 Missouri River channel. It is a common phenomenon, as described by the witnesses, that when a river moves away from its previous channel by the process of erosion of a point bar that it will close up the old previously existing channel at the upper end leaving a remnant chute (2179:S), (known locally as

the "Iowa Chute") such as that found adjacent to bar "A" on the east.⁷

(c) Bar "B" is not identifiable land in place because it is barren of vegetation and therefore is obviously a middle sand bar which has recently formed during the westerly movement of the river between 1867 and 1879.

(d) Like bar "A", bar "C" has willow vegetation growing on it. Willows are the first vegetation to grow as waters recede (1390:20). Thus the mere existence of willows on bar "C" does not, standing alone, support a finding that bar "C" was left in place through an avulsion. The only other evidence that bar "C" is land-in-place is the fact that the 1879 maps locate bar "C" in the northeast corner of Section 19, Range 11 east, Township 24 north. This location is within the Barrett Survey line and was on the Nebraska side of the river. From its review of the evidence, however, this Court finds that the land which had been located in the northeast corner of Section 19,

⁷ Judge George Prichard Testimony: "We called those the Iowa Slough. Always along the Iowa bank when these places formed, when the sandbars formed in the river, the water runs on both sides for a while. Then eventually up at the north end then the other side there would be a slough along the Iowa side. The main channel would usually work west. Then the upper end of the Iowa slough would close up. Low water or fill up, I don't know which. Then eventually the whole thing would close up. Although in this particular locality, English Bayou, which was below a mile or two, it stayed open after 1940, I know" (2430:11). "Q: Was this closing up of the Iowa chute at the upstream end a common occurrence from your observations as you hunted along the river? A: In my opinion that's the way they always formed. Q: From your observations? A: Yes." (2442:7).

Range 11 east, Township 84 north had been eroded away at some time prior to the 1879 Missouri River Commission map, and further finds that bar "C" is a middle bar which formed on that location as the river migrated west. Bar "C" had, by 1879, existed long enough to support willow growth. In this connection, it should be noted that, by 1890, the area in the northeast corner of Section 19, Range 11 east, Township 84 north, bears no vegetation which is described on maps as being different from vegetation on other areas in the surrounding land mass which had formed by 1890. (See Tribe's Exhibit 101.) If bar "C" were land-in-place which had existed prior to 1879, it would have supported the growth of cottonwoods or other vegetation more substantial than willows by 1890.

(e) Bar "D" cannot be identified as being land in place which existed at the time the meander lobe was surveyed by Barrett because those bars are likewise middle sandbars only and being barren of vegetation are therefore forming behind the southerly and westerly migration of the river as it moves to the southwest depositing accretion material on the opposite side of the channel during the course of its movement (2587:17-2589:13; 2948:5-2949:12).

(f) The shape, location, position and condition of bars "A", "B", "C" and "D" are consistent with the gradual southwesterly movement of the river away from an easterly high bank; a movement of that sort would erode away the meander lobe as surveyed by Barrett in 1867; such a movement would likewise deposit accretion on the side of the river opposite the

erosion which is exactly what is seen in bars "A", "B", "C" and "D".⁸

(g) Of remarkable similarity, are the experiments of Captain Friedkin (Exhibit zz) which show the process by which accretion to the riparian land is formed by the meandering of alluvial rivers such as the Missouri.⁹

(h) Between 1867 and 1879 the meander lobe was low and at times entirely under the surface of the moving river. The Friedkin experiments and the hydrologic experience shows that during high water flows, the river will flow and erode against the upper side of the point bar as revealed by Major Suter (Exhibit XX, P. 1652). Therefore the main channel begins to move against the lobe eroding the same (2934:21-2937:7). As the lobe erodes, the channel migrates to the south and west. As the channel moves over the area where the lobe had existed, it removes remaining portions of the lobe by scouring itself a new channel. In other words, this shift in the course of the river is a consequence of progressive scour and deposition (the scour occurring against the meander lobe and the deposition occurring on the opposite side of the channel from

8 Testimony of Dr. George Hallberg: "My opinion on those bars is very similar to what I have described for the formation of bar A. As the main channel of the river has shifted from the high bank to the west and to the south, we have in essence what I have been describing, back filling behind it in this area of low energy environment. Just as we have built bar A down in this point off in this direction, we have continued to build these bars down" (2604:16-23).

9 See Exhibit zz, Plates 22, 53 and 61.

where the scour occurs). The logical result of this deposition is the formation of bar "A" as shown on Exhibit W-N3.¹⁰

FINDINGS BY THE COURT — 1852-1879

The plaintiffs base their case on the testimony of Mr. Clark, Dr. Robinson and Dr. McQuivey as to the movement of the river between 1875 and 1879. Their testimony in this regard is very vague and oftentimes uncertain. Mr. Clark simply recites that it is his opinion that between 1875 and 1879 the river by series of movements changed its channel from the 1875 position against the easterly high bank to its 1879 position as shown by the Missouri River Commission mapping (291:17). Although he doesn't know when (612:17-23). Dr. Robinson is inconsistent with Mr. Clark in this regard inasmuch as Dr. Robinson thinks that the sudden avulsive movement as he described it occurred in 1879, before June (1161:9-14). Dr. McQuivey contradicts this by concluding that there were "several major

10 Testimony of Dr. John F. Kennedy: "Q. The question essentially is what's your opinion as to how bar A, as is shown on Exhibit N-3, and during the recess we put up U because it has the thalweg soundings on it. How was that formed during the period between 1875 and 1879?" (2947:11-15). "THE WITNESS: All right. I have testified that it is my judgment that this whole convex bar had been obliterated during this period of high flows that occurred in four years between '75 and '79. Now, as the channel progressively moved to the west and with the thalweg shifting westward, this would become a river of diminished velocity, a slack water area or area of lowest velocity. Consequently, sediment that gets into this area would tend to be deposited because of the diminished sediment transport capacity of the water flowing in this area. Additionally, when this was all inundated there would be moving through it here an ensemble of very large sand waves or sand dunes." (2947:19-2948:7).

jumps" (1502:8). A careful examination of the testimony and the mapping done in 1879 leaves little doubt in the mind of the Court but what Dr. Robinson is in error in his conclusions. If the avulsion had occurred in 1879 as Dr. Robinson opines, then it would be impossible for willows to be growing on bar "A", because the willows are growing at a place where the channel would have to have been flowing (1152:20). Obviously those willows growing along the easterly end of bar "A" would have been in the 1879 channel prior to the avulsion. Therefore for the willows to be growing at that place as mapped by the 1879 Missouri River Commission would be an impossibility as even willows don't grow that fast. The testimony of Mr. Clark is likewise inconclusive. Elmer Clark is a surveyor with considerable experience, but he is neither a geologist nor a hydrologist (747:22).

On the other hand the testimony of Doctors Hallberg and Kennedy is extremely persuasive (2939:4-2944:18; 2567:18-2568:10; 2571:12-2576:13). Both are highly qualified, both educationally and by experience in their field and with the Missouri River. Their testimony is more clear and convincing to the Court and the most probable in the light of reason, common experience and the other evidence in the case. Their testimony is adequately supported by the testimony of Raymond Huber whose practical knowledge and expertise was gained by 37 years during which he traveled, studied and engineered the control of the wild and untamed Missouri River.

It is therefore the Finding By The Court that between 1852 and 1879 the Missouri River moved to its easternmost position at a point east of and outside of the Barrett

Survey Area. Having reached that most easterly location, the river, by a gradual progression during periods of high flow commenced a southerly and westerly migration away from the easterly high bank (2606:6-25). This caused the old channel against the easterly high bank to close at its upstream end by the process of deposition and siltation leaving a remnant of the old channel against the easterly high bank such as has been described by Judge Prichard (see footnote 7, supra). As the river moved in a gradual progression to the south and west it was eroding against the meander lobe as surveyed by Barrett in 1867 destroying and entirely washing the land surveyed by Barrett down the river (2955:17-2956:19). Deposition of silt, sands, and gravels (described by plaintiffs' counsel as "alluvion") was occurring during this process. This resulted in additions of new land to the left bank which new land was beyond the power of identification. It was in fact accretion to the Iowa riparian landowners in Sections 29, 28, 34, 33 and 32 in Township 84 North, Range 46 West (2951:3-2952:15).

As a consequence by 1879 the action of the Missouri River had completely obliterated and washed away the meander lobe as surveyed by Barrett to almost the westerly edge of Iowa Sections 29 and 32 in Township 84 North, Range 46 West, as well as the lands surveyed by Barrett which fall within Iowa Sections 28 and 33 of Township 84 North, Range 46 West. As a consequence the Court finds that the claims by the plaintiffs that any lands within Iowa Sections 28, 29, 32 and 33, Township 84 North, Range 46 West as being identifiable land in place as the result of an avulsion between 1875 and 1879 are not substantiated by the greater weight of the evidence. The Court finds by a preponderance of the evidence, that in 1879 any lands lying

within Iowa Sections 28, 29, 32 and 33, Township 84 North, Range 46 West as surveyed by Barrett were new lands added by the process of erosion and accretion to the shoreline and were not identifiable as land which remained in place through the river movements and were accretion land to the Iowa riparian owners.

D. THE MISSOURI RIVER BETWEEN 1879 AND 1890

1. 1881. It is conceded by all of the witnesses that in 1881 a flood occurred on the Missouri River which recorded the highest flood waters of any time since reliable records have been kept (Exhibit T97 and T104; Exhibit G124). In fact, Exhibit T97 reveals that the 1881 flood waters were ten feet higher than the June 16-20, 1879 water level (606:1-7). However, no maps were made of the Missouri River in the Blackbird Bend area between 1879 and 1890. Therefore, the effect upon the landscape in the Blackbird Bend area by virtue of the tremendous force of the 1881 flood is factually unknown. There is testimony, however, that during periods of high water flows, the river channel tends to straighten which will modify the channel configuration (1507:22; 2951:13-17). Following a flood of this magnitude the channel then begins to seek a new equilibrium and to consolidate its course (2959:8-15). Changes in the channel upstream from the Blackbird Bend area likewise are of considerable significance during this period of time (1508:10).

In 1890 the Missouri River Commission again mapped the channel as shown by Exhibits W-P3, T32 and T101. The mylar overlay, Exhibit W-Y7 when overlaid on W-X7 shows that the course of the river after 1879 and by 1890 has in fact straightened somewhat and has moved by migration

somewhat to the north and to the east of its 1879 position. All parties agree that this northeasterly movement would be by erosion against the left bank with some accretion deposition occurring on the right bank.

There is however a very significant feature on the 1890 Missouri River Commission map which must not, at this point, be overlooked. The map clearly shows that lands located with Sections 28, 29, 32 and 33 in Township 84 North, Range 46 West, which had previously been within lands surveyed by Barrett in 1867 are now solidified and vegetated accretion land to the left bank Iowa riparian owners (Exhibit W-P3). This simply shows the normal and logical progression of the accretion which was shown to be forming in 1879 when the river was then mapped by the Missouri River Commission.

A thorough examination of Exhibit W-P3 which is a scale copy of the 1890 Missouri River Commission map with the Barrett survey line superimposed thereon shows a material change in the upstream channel from Blackbird Bend (McQuivey 1508:10 & 1538:20). It shows the formation of a bend upstream which is similar in shape to the Barrett survey meander but not nearly as large in size. A long westerly oxbow on the approach to Blackbird Bend indicates erosion against the right bank and deposition in the form of a point bar on the left bank. Two other land features are shown which have been identified as being left as the result of the avulsive action of the river (2589:2-13). These are Blue Lake shown to the east of the Blackbird Bend and which was formed before 1852 (2827:17) and an old riverbed "cutoff 1875" which lies southerly of Blackbird Bend and which has been referred to in the evidence

as Lake Quinnebaugh. The significance of these two features bears discussion (2593:18-2594:6). Recall the plaintiffs' claim that between 1875 and 1879 an avulsion occurred when the river allegedly left the easterly high bank and moved to its 1879 position as shown by the Missouri River Commission map. However, an examination of the land features in Blackbird Bend reveals that the land features are strikingly dissimilar to Blue Lake and Lake Quinnebaugh (2594:7-10; 2595:8-19). Those features indicate that when an avulsion occurred in the areas of Blue Lake and Lake Quinnebaugh it left the then river channel in substantially its then width, depth, shape and position. This formed an oxbow lake of significant size and depth. Had such an occurrence taken place between 1875 and 1879, as alleged by the plaintiffs, it is the Court's opinion that a similar land feature should have likewise remained and would have been so mapped in 1879. The absence of such a land feature is substantial evidence in the mind of the court that an avulsion did not take place between 1875 and 1879 in Blackbird Bend as alleged by the plaintiffs. Likewise the condition of the land in 1890 in Sections 28, 29, 32, and 33, Township 84 North, Range 46 West shows it to be covered with vegetation and trees and has by that time become all accretion to the Iowa riparian owners in Iowa Sections 28, 29, 32, 33, and 34, Township 84 North, Range 46 West.

E. MISSOURI RIVER BETWEEN 1890 AND 1912

The evidence is somewhat uncertain as to the movement of the river between 1890 and 1912. There is an 1894 Monona County Survey of the left bank which is of some assistance as to the left bank of the river (Exhibit U-3).

This does show a continued northeasterly migration of the left bank of the river which is consistent with the position of the river in 1890. The 1894 county survey shows the left bank in approximately the same location as shown by the Missouri River Commission in 1890, but an accretion bar has formed which is strikingly similar to bar "A", as shown on the 1879 map. There is a 1900 plat of accretions made by Monona County Surveyor R. S. Fessenden which is received in evidence (Exhibit Z-3). The 1900 Monona County surveyor shows accretions to government lots in Sections 28 and 33, Township 84 North, Range 46 West in Monona County, Iowa, and is recorded on January 23, 1901 in the office of the Monona County Recorder. Exhibit U-8 is an overlay of the 1900 Fessenden survey, Exhibit Z-3, showing the continued westerly movement of the accretions lands as shown by the 1890 survey.

An atlas map, published by the George A. Ogle Company in 1906, is received in evidence as Exhibit D-4, and the Tribe composite made from that map has been received in evidence as Exhibit T-102. This indicates some additional north and east migration of the left bank of the river but is of little assistance to the court as to the location of the right bank during this period. These are the only maps between 1890 and 1912. However, the general course of the river during this time indicates the development of a pattern which is somewhat similar to the easterly migration of the river during the period between 1852 and 1867. The river is meandering further north than it had in 1867, but not as far to the east (2639-2640). There is some erosion into the accretion which had previously formed adjacent to the Iowa left bank riparian owners (2642:22-2643:12).

F. THE MISSOURI RIVER BETWEEN 1912-1923.

In 1912 a left bank survey was accomplished by surveyors Fairchild and Oliver. This original survey has been received in evidence as Exhibit Q-8. Payment for this survey was authorized by the Monona County Board of Supervisors on March 5, 1912 as evidenced by Exhibit H-4. It was a survey of the Monona County west boundary, or as described by the minutes of the County Board of Supervisors, the "Missouri River Line". An examination of the exhibit leads to the obvious conclusion that it is the original survey map as made by surveyors Fairchild and Oliver upon which have been superimposed some Lewis and Clark camp sites by historian Mitchell Vincent (See, Exhibits T71 and T72).

The significance of the Fairchild survey (as it is referred to in the evidence) is two-fold. First, it shows the 1912 water line on the Iowa side of the river as surveyed by Mr. Fairchild. Secondly, in partial Section 24 and 25 of Township 84 North, Range 47 West and in partial Sections 19 and 30 of Township 84 North, Range 46 West it shows the development of a sandbar of rather substantial size which is obviously a point bar that has begun to develop by virtue of a change in the course of the upstream channel of the river (2650:6-2652:13). Because of the angle of the river channel upstream from the area where the Fairchild Survey map locates the Sandbar (See Tribe's Exhibits 102, 103), the river would have been eroding the right or Nebraska bank at a point upstream from the sandbar. This erosion would, according to the expert testimony, be very likely to deposit sand in the area depicted as sandbar in the Fairchild map. The formation of this bar began

to occur sometime after 1894 and before the time of the 1912 Fairchild survey. The authenticity of the sandbar as shown on the Fairchild survey is challenged by the plaintiffs. They imply that the bar was mapped by someone other than Fairchild (perhaps Mitchell Vincent) or that the map was in some manner "doctored" either by the defendants or someone on their behalf (3143:12). A careful examination of the exhibit, together with other evidence and expert testimony as to the behavior of the Missouri River, leads the court to the conclusion that this exhibit is authentic and of assistance to the court. The defendants introduce in evidence Exhibits A through P. These exhibits are a series of letters from the Omaha Indian Reservation Agency Superintendent to the Commissioner of Indian Affairs during the period from 1907 and continuing until 1922. Thus, while they were not written by hydrologists they are accounts of the river's behavior which were prepared at a time when few reliable maps of an official nature are available, and are based on actual observation. They deal with the request by certain Indians of the Omaha Tribe or their heirs requesting that their allotments which had previously been granted to them of lands within the Omaha Indian Reservation be exchanged for new allotments. The reasons stated for the exchange requests were that the land originally allotted to the allottees was or had been washed away by the Missouri River. To better understand the relationship of these allotments and the relationship of the allotment exchange letters previously referred to, the court has examined Exhibit T80. The area in orange shown on Exhibit T80 is land which has never been allotted to any member of the Omaha Tribe and has never been patented by the United States Government to anyone; the area in

green represents allotments which have been relinquished and are directly related to Exhibits A through P; the cross-hatched areas are lands which have been sold or otherwise left their trust status after the 1854 Treaty.

The plaintiffs disregard and disavow any significance to the allotment exchange letters (Exhibits A through P) (1135:18-1136:14) and assert that the verbiage used in the allotment exchange letters describing the action of the Missouri River as "washing away" the allotment lands is only the description of a nonprofessional person, unfamiliar with the action of the river. They conclude that the land was not "washed away" as described in the letters, but rather simply inundated by high water flows during stages when the river was in flood. The defendants on the other hand relate the allotment exchange letters to the formation of the sandbar as shown by Fairchild in his 1912 survey. Exhibit F-4 was prepared by witness Huber, from the information contained in Exhibits A through P, S and T19. Mr. Huber then reconstructs what he believed to be the location of the right bank of the river in 1912 (2054:22-2059:7) in order that the right bank position might be compared with the location and position of the sandbar as shown by Fairchild. This reveals that the right bank, as reconstructed by Huber is consistent with the Fairchild sandbar. In support thereof, defendants, also introduce a sketch of the 1907 and 1908 river by one Thomas R. Ashley and a letter from the Superintendent of the Omaha Agency to the Commissioner of Indian Affairs enclosing a copy thereof which is dated October 23, 1908 (Exhibit R). The Ashley sketch and the letter to which it is attached describes the action of the Missouri River during that period as it relates to lands which are now located in Sections 24,

25, and 36 of Township 83 North, Range 47 West. The sketch of Mr. Ashley indicates that the river during that period is migrating in a southerly direction eroding against the right bank of the river washing away Indian allotment land and producing deposition on the left bank which is accretion to the Iowa riparian owners. Of some significance in this regard is also an Omaha Reservation Plat made by Reservation Farmer Corney O. Preston which is dated in May, 1914 and received in evidence as Exhibits I-4 and J-4. The witness Huber then prepared Exhibit L-4 which is a composite map showing the Fairchild survey as shown in Exhibit Q with the right bank line from the Preston plat (Exhibit I-4) and a reconstruction of a plat showing the allotted lands reportedly eroded away from the letters Exhibits A through P, as shown by Exhibit F-4 (2063:2-2064:7). The end result of all this tends to show the authenticity and reliability of the allotment exchange letters as they relate to the action of the Missouri River during this period of time.

In the light of the Indian allotment exchange letters, the Preston map and the Ashley sketches, the sandbar shown on the Fairchild 1912 survey becomes increasingly significant. It is the position of the plaintiffs in this case that the river was against the northerly high bank in about 1912. The witness Clark is of the opinion that the river left the northerly high bank in a sudden noticeable movement by one or more avulsions to reach its position in 1923 (455:7 and 524:19), however, he doesn't know how many (639:11) and he could find no records (779:20). He comes to this opinion because of the fact that there are sloughs running next to the northerly high bank which are the remains of the 1912 main channel. The sloughs to which Mr.

Clark makes reference are primarily in Sections 19, 20, 28 and 33 in Township 84 North, Range 46 West. The remnants of these sloughs are evident on the ground today. The witness Dr. Robinson is of the opinion that between 1908 and 1916 there were several high water times which produced a change in the river to the south and it moved over toward the Nebraska bluffs and inundated the Barrett survey area and reached its 1923 position. It is his opinion that this occurred suddenly during one high water period (1067:13-1068:16).

Without commenting on the inconsistencies between the opinions of the witnesses Clark and Dr. Robinson, the Court believes that the following evidence contradicts those opinions:

(a) The slough areas found in Sections 19, 20, 28, 29 and 33 of Township 84 North, Range 46 West are more representative of the so-called "Iowa Chute" than they are evidence of avulsions. As earlier indicated, an avulsion normally leaves a prominent landform remnant such as Blue Lake, which is shown on the 1946-47 Corps of Engineers Sheet #72. (Exhibit U-8); or Badger Lake (Exhibit N-7A) or Lake Quinnenbaugh (Exhibit P-3) (2593:18-2594:6). These lakes, formed by avulsive cutoffs, are sufficiently wide to indicate that they lie in an intact abandoned channel, rather than a remnant of a channel. The Court believes that if an avulsion had occurred between 1912 and 1923 a landform remnant should have remained against the northerly high bank which would bear a reasonable resemblance to the lakes above referred to. The sloughs which remain are considerably more nar-

row and of less depth than would be evidenced by a sudden channel change which would leave the old river channel in place (2827:13-2828:17).

(b) Exhibit P-8 is an aerial photo mosaic of aerial photographs taken by the Corps of Engineers in 1925. Dr. McQuivey, a river hydrologist testified on behalf of one of the plaintiffs. It was his opinion that this aerial photograph showed evidences of many old channels which developed as the river progressed from the northerly high bank to its 1923 position. It was his opinion that these were main channels at one time. He marked on said exhibit in red the outlines of the old channels as he saw them (1683:23). His testimony is consistent with that of the witnesses of the defendants who state that after the river moved to the northerly high bank it then began to erode to the south during periods of high water depositing accretion materials to the left or Iowa riparian land as the progression took place (2679:10-2682:11; 2134:24-2139:2; 2967:1-2968:9). This is consistent with the sketch of Mr. Ashley, the Indian allotment exchange letters indicating erosion against the right bank with resultant deposition against the left bank, with the formation of the sandbar as shown by the 1912 Fairchild survey and with the testimony of Judge Prichard who was on the land in 1919 and described it as being all "bar" land with scattered sloughs, lakes, small willows no higher than a horse and a few scattered cottonwood trees 2432:4; 2423:12; 2435:9). It is also consistent with the angle of approach by the upstream channel as is shown by the Fairchild survey (Exhibit Q-8) (2650:6-2652:13).

(c) Plaintiff's witnesses acknowledge that there was an extremely wet cycle from at least 1910 to 1917 or 1918, as shown by the hydrograph prepared by the Witness Clark, as Exhibit T-112 (505:11). Mr. Clark likewise admitted that his Exhibit T-104 shows high water periods substantially above the elevation of 1045 feet in years 1905, 1906, 1912, 1913, 1915, 1916 and 1920. (578:17; 580:10-17). To like effect is the testimony of plaintiff's witness Dr. Robinson (1052:15; 1062:1). The witness, Ross Willey, then age 13, observed the river during the June rise in 1916. He marked on Exhibit M-5 the position along the northerly high bank where he rode on horseback and observed the river (2008:8). He could see out across the main channel and could see the town of Decatur, and between where he sat on horseback and the town, he could see some bayous, water at different spots, weeds, small brush and bare spots where sand blows (2402:7). In 1920 he became aware that Joe Kirk was trying to grow some sweet clover and alfalfa on some of the bare land that was just a little south and west of the present-day buildings; there were still a lot of sloughs and standing water areas and Kirk was doing a little clearing (2404:23). Kirk continued in possession from 1920 until he sold out to the Petersons and was there every year farming and clearing (2413:25). In 1919, Judge Prichard then a young lawyer, age 25, went on the bar with Joe Kirk in August or September. He marked on Exhibit J-5 the point where he and Kirk crossed the Iowa Chute with saddle horses (2423:3). He describes the area as "new bar land," with lots of small willows,

sand dunes and small cottonwoods as big as maybe an inch and a half (2424:5). He saw no indication of any land that could be called land in place, other than the bar land, and no trees except new growth (2424:23). He and Joe Kirk rode over the entire bar looking at the river, and just generally looking over the land. There was water standing in low places (2430:9). He describes the area to the north and west of where they entered the Kirk property as "just sandbar" with little willows and sand dunes and once in a while a patch of cottonwoods that they could ride through without any trouble (2432:4.) During this ride with Joe Kirk, he did not see any indication of any trees or land that appeared to him to have been cut off from the Nebraska side of the river. It just looked like "all new bar" to him (2433:12). The whole area looked to him as if it had started building up in the north end and had built gradually southward. It was many years before the southern land built up to that closer to the north high bank (2437:23). He had observed the formation of land in this manner in other bends of the river because his family was interested in similar land called Hedges Bar. He describes the formation as a bar in the river with the water flowing on both sides and then it would close up at the upstream end and leave a kind of old remnant of the channel lying up against the high bank, which was called the Iowa Chute (2440:6). The descriptions of the land by witnesses Willey and Prichard, who have absolutely no interest in the outcome of this litigation, is certainly the only clear picture of the land as it appeared at that time. If the land had been land in place as indicated by Clark and Dr. Robinson,

it would have had more vegetation growing on it and vegetation should have been much taller than is described by the witnesses. The Court can conclude that the land described was formed by the gradual erosion of the river southward from the northerly high bank, with the deposition occurring on the Iowa side of the erosion, leaving sandbars, sloughs, bayous and other landform remnants which are typical of that type of river movement (2079:11). This lay testimony, based on actual observations, is of considerable significance.

(d) Another line of evidence in which the Court places reliance is the matter of the slope and gradient of the land throughout the entire Blackbird Bend area as it exists today. Dr. McQuivey's profiles of the Blackbird Bend area (Exhibit G-154) indicates the slope and gradient of the land as it presently exists to be generally sloping from the west to the east (1620:25). The topographic cross-sections prepared by Dr. Hallberg (Exhibit W-8) reveals that those cross-sections show a general gradient and slope from the northwest to the southeast, so that surface water would drain through the area generally from the northwest to the southwest (2679:10-2682:11). This is consistent with the testimony of Drs. Hallberg and Kennedy, as to the manner in which the river migrated through the entire Blackbird Bend from the time when it reached the northerly high bank after 1890, until it reached its 1923 position, as shown by the Corps of Engineers. It is inconsistent with the theories of Mr. Clark and Dr. Robinson, who claim that the river migrated to the north and east after 1890, eventually reaching the northerly high bank and then jumping suddenly to its

1923 position. If this were in fact the case, as the Court understands the expert testimony, the slope and gradient for the drainage of surface waters should be to the northeast, rather than to the southeast as is indicated by the cross-sections.

This might also be a pertinent place to comment upon an inconsistency which in the Court's mind is of no small significance. It is the plaintiff's claim that whenever the river moved to the east to the easterly high bank and whenever it moved to the north and east to the northerly high bank, that it did so by the process of erosion against the left or Iowa bank, with corresponding accretion deposits to the right or west bank. However, whenever the river moved to the west or to the south, the plaintiffs claim that it did so by a "jumping action" so as to qualify in the eyes of the law as an avulsion. It strikes the Court somewhat strange that the river would move in two directions by erosion and in the two opposite directions by avulsion; in this regard, defendant's have introduced evidence to the contrary (2601:22-2602:15; 2642:22-2643:12). A study of the Corps of Engineers maps from 1923 until as late as 1940 does not indicate to the Court in any manner that the river was "jumping" from one channel to another during that period of time (2967:1-12); and a careful study of the maps reveals that whenever the river moved it always moved by erosion, whether it be east or west, north or south. This factor, coupled with a lack of any substantial evidence that the land was left as identifiable land following a particular movement lends considerable credence to the theory of the

defendants while leaving considerable suspicion as to the theory of the plaintiffs.

(e) There is evidence in the record of a cottonwood tree which is 67 years old (1373:25) that was standing alone in Section 24, Township 84 North, Range 47 West. This tree was marked on Exhibit T-101, Exhibit T-105, Q and T-105A. The plaintiffs claim that the age of this tree supports their contention of an avulsion between 1912 and 1923, because if the tree was sixty-seven years old it had to have started growing in about 1908 or 1909; therefore, if the river had moved away from the northerly high bank by erosion, the tree should have been swept away by the action of the river. This assumes that the river was against the high bank in 1912, but there is some evidence that the river had left the northerly high bank by 1907 or 1908 (Exhibit R—Ashley sketch of 1907 and 1908 rivers). This Court is unwilling, on the evidence, to join in the assumption that the river was at its northernmost position in 1912. It appears that the most that can be said about the northernmost position is that it was reached at some point between 1890 and 1912, but probably prior to 1912. The defendants on the other hand, contend that this tree was growing on the Fairchild sandbar and that explains its age. The location of the tree is marked as red dot surrounded by a circle by the Witness Virtue on Exhibit Q and is shown as being located on the edge of that bar. Plaintiff's witness Clark located the tree at a point 100 feet from the edge of the Fairchild sandbar (Exhibit 105-F). The Court is satisfied that when Fairchild made his survey in

1912, he did not survey the sandbar and, therefore the precise location thereof is not to be assumed from the survey map. This conclusion is supported by the fact that Judge Prichard saw no trees of any size in 1919. It is the Court's opinion that it is more likely that this tree commenced growing on the Fairchild bar than it is that the river moved avulsively as claimed by the plaintiffs. This conclusion is reached because of the fact that the lay and expert testimony most credible to the Court demonstrates that the river's change at this time was erosive and accretive rather than avulsive.

FINDINGS BY THE COURT—1879-1923

The Court therefore concludes from a review of all of the evidence in this case, including the maps which are pertinent to the time period between 1890 and 1923, that the plaintiff's evidence falls far short of the evidence which would be necessary to prove an avulsion or avulsions. To the contrary, the testimony of the defendants' lay and expert witnesses, is the most clear and convincing to the Court's mind. Therefore, for all of the reasons which have heretofore been stated, the Court finds that there were no avulsions in the Blackbird Bend area between 1890 and 1923, and that the movements of the river during that period of time were erosive in nature so that accretion was being formed on the side of the river opposite the erosion. The Court finds that after 1890 the river moved erosively until it reached what is now the northerly high bank following which it commenced a southern migration throughout the Blackbird Bend area until it reached its 1923 position. This migration eroded

almost all of the westerly end of the land as surveyed by Barrett in 1867 and the deposition which occurred during the southerly migration of the river was accretion to the northerly and easterly high banks and thereby became accretion to the Iowa riparian owners. The Court is satisfied that no other conclusion is tenable from the evidence in this case.

G. THE RIVER FROM 1923 TO 1940

Generally, the witnesses are in agreement as to the interpretation of the Corps of Engineers maps, the first of which was made in 1923, and is in evidence in this case as Exhibits W-04; T-35 and T-105, composite. The 1923 map shows the river running generally in a north-south direction through the westerly end of Blackbird Bend, until it reaches a position in Iowa Section 36, Township 84 North, Range 47 West, when it makes a 90 degree angle turn to the east, where it traverses Iowa Sections 31 and a part of 32, Township 84 North, Range 46 West, whereupon it then turns south again and passes out of the right bank meander as surveyed by Barrett. In view of the conclusions heretofore reached by the Court, the land lying east and north of the river in its 1923 position, has already been determined to be accretion land to the Iowa riparian owners. Therefore, the remaining question as to the migration of the river in this period of time is as to that land still within the Barrett meander survey line, which lies adjacent to the right bank of the 1923 river. Necessarily, an examination must then be made of the river as surveyed by the Corps of Engineers in 1927. The 1927 maps are received in evidence as Exhibits W-S4, T-36, and T-106, composite.

It is apparent from an examination of the exhibits that after 1923 the river moved slightly to the east and then migrated south and west, leaving behind it a large point bar identified on the 1927 maps as "Low Bar". This low bar shows the remnant 1923 or later channel which is mapped by the Corps of Engineers as a "slough". Some other minor channel remnants are seen sticking into the low bar like fingers from the easterly side thereof. By 1927 the Corps has mapped the landforms (i. e. trees, bars, swamps, lakes, etc.) within the entire Blackbird Bend, which was not done by the Corps on its map in 1923. Although plaintiffs' witnesses disagree to some extent with the Corps mapping, the Court is of the opinion that the Corps of Engineers was in a better position in 1927 to verify the accuracy of its mapping than the plaintiffs would be by the current use of photo-interpretation of aerial photos made in 1925. On the 1927 map and east of the former 1923 river is shown large areas of marsh and lake, which the Court believes is further evidence of the southerly migration of the river after 1890. The 1927 map clearly indicates that much of the land was just beginning to develop as accretion to the Iowa riparian owners (2693:12-25; 2702:6-15). The vegetation shown on the 1927 map is likewise consistent with the testimony of Judge Prichard, who had been on the land in 1919. The low bar area shown on the 1927 map, is the beginning of accretion land to the Iowa riparian owners in Sections 32 and 31 of Township 84 North, Range 46 West. The movement of the river between 1923 and 1927 was by erosion against the right bank and accretion deposition to the left bank.

The river from 1927 to 1940 is likewise fairly clearly traced. Private levees were constructed by Joe Kirk and later the Corps of Engineers constructed some pile dikes and an abatis to begin to train the river into its designed alignment. The 1937 reconnaissance map, Exhibit W-B5, shows some of the changes in the condition of the river from its 1930 alignment. These dikes and abatis had the effect of forming accretion to the Iowa riparian land adjacent to the dikes (2093:24). There is no evidence between 1923 until 1940 of any avulsion that occurred through the natural forces of the river or through man-made levees, dikes or abatis (2103:1).

FINDINGS BY THE COURT—1923-1940

Therefore, the Court finds and concludes that all of the land formed to the east of the Missouri River as its channel was located in 1940, was accretion, either natural or man-made to the Iowa riparian landowners.

In 1943, the States of Iowa and Nebraska entered into a Compact Agreement which was based upon the 1940 position of the Missouri River in the Blackbird Bend area (Exhibit W-F5). The compact between the two states concluded once and for all that the land lying easterly of the compact line was located within the State of Iowa and that land lying westerly of the compact line was located within the State of Nebraska. The location of the compact line is not in dispute in this suit and, therefore, the Court must finally conclude that all of the land lying east of the 1943 Iowa-Nebraska compact line is accretion land belonging to the Iowa riparian owners and is not owned by nor subject to claim by the Omaha Indian Tribe, or the United States of America, as Trustee for said tribe under the Treaty of 1854.

Although these factors did not influence the decision of the Court in these findings, the Court feels compelled to comment upon the history of the activities of the defendants and their predecessors as it relates to the Blackbird Bend area. The evidence is without dispute that the Omaha Indian Tribe has not been in either possession or occupancy of the land within the Barrett Survey Meander since 1912 or before. There is considerable evidence in the record that the defendant's predecessor in title, Joe Kirk, came upon the land in approximately 1915 and commenced to clear and farm such areas of it as could be made farmable. From that time forward, the land was in the process of being cleared, drained, leveled, and improved for agricultural purposes by Kirk and others. There is in evidence in this case a certified copy of the Judgment and Decree of Cause No. 10093, District Court of Iowa in and for Monona County, entitled *George D. Whitney v. Joseph A. Kirk and Bertha Kirk*, wherein the Iowa District Court on November 30, 1928, concluded that Joseph A. Kirk was the owner of the Northeast Quarter of Section 19, Township 84 North, Range 46 West, lying upon the high bank, and that all land lying adjacent thereto was accretion land and as such, Kirk was entitled to title and possession of all lands lying south of a line commencing at the southwest corner of the Northeast Quarter of Section 19, Township 84, Range 46, and running in a southwesterly direction at right angles to the bed of the Missouri River and between said line and a line commencing at the southeast corner of said Northeast Quarter of Section 19 and running south to the bed of the Missouri River (Exhibit W-CC). Although this Court realizes that that judgment and decree

is not binding in any way upon the Court at this time, it is simply a further indication, from a different source, assumedly based on the evidence of witnesses at that time, that the land in Blackbird Bend lying southerly of the northerly high bank was formed by the process of accretion. Also in evidence, are Wilson Exhibits AA and BB, which are quiet title actions brought by the defendants or their predecessors in interest, of substantially all of the land with the Barrett Meander Survey, which quieted title to the riparian owners in 1962 and 1963 as against all persons except the United States. Finally, there is evidence in this case Exhibit W-D3 which is the Certificate of the Monona County Treasurer, showing payment of the taxes on the land within the Blackbird Bend by the defendants or their predecessors, since said land was placed upon the tax rolls.

There is no evidence of any possession by the Omaha Indian Tribe or of any improvements to the land by the Omaha Indian Tribe at any time even since temporary possession was granted by this Court by Temporary Injunction in 1975. All of these factors are of significance to the ultimate disposition of this cause as historical facts which have assisted and aided the Court in reaching a final determination.

H. FINDINGS OF FACT ON THE MERITS

From all the evidentiary matters heretofore discussed, the COURT FINDS:

1) That the movement of the river from its 1867 position to its 1879 position was by gradual erosion against the banks of the river resulting in accretion

deposition opposite the erosion; that there is no clear and convincing evidence of an avulsion during that time period which left land which could then or can now be identified as land in place.

2) That after 1879, the river moved erosively until it reached the present northerly and easterly high bank, sometime after 1890.

3) That after reaching the northerly and easterly high bank, the river then commenced a southern migration, eroding the right or Nebraska bank as it moved and depositing accretion on the left or Iowa side of the river until it reached its 1923 position as shown by Exhibit W-04; there is no satisfactory evidence of an avulsion which occurred between 1890 and 1923.

4) That after 1923 the river continued to move southerly until 1927. After 1927 the movements of the river were primarily east-west within the western end of the Barrett Survey but in all instances the movements were erosive in nature and not avulsive.

5) That by 1940 all of the land previously formed within the 1867 Barrett Survey had been eroded away by the action of the river leaving no identifiable land in place and the new land within the Barrett Survey and easterly of the center of the 1940 river in Blackbird Bend was accretion to the Iowa riparian land to which it had attached.

6) The land owned by Roy Tibbals Wilson, RGP, Inc., Charles Lakin, Harold M. Sorensen and the State of Iowa lying within the Barrett Survey of 1867 and lying east of the 1943 Iowa-Nebraska Compact line is accretion

to Iowa riparian land and neither the United States of America nor the Omaha Indian Tribe has any right or claim thereto.

7) The Omaha Indian Tribe has not been in possession for at least 40 years or more of the land referred to in the preceding paragraph but rather the defendants or their predecessors in title have been in possession.

8) As to Travelers Insurance Company, they are a mortgagee only and as such have not been in possession or dictated the use of said land.

From the foregoing Findings of Fact, the Court now makes the following:

—o—

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and of the subject matter in controversy in these consolidated cases. The claims asserted herein by the plaintiffs, Tribe and the United States of America, arise under a Treaty of the United States and involve sums in excess of \$10,000, exclusive of interest and costs. Jurisdiction is, therefore, conferred upon this Court by 28 U. S. C. §§ 1331, 1345 and 1362.

II.

As discussed in the Memorandum Opinion on file herein, state law applies in determining this dispute, and plaintiffs are entitled to rely on Nebraska law to prove their title.

III.

The burden of proof is upon the plaintiffs, Omaha Indian Tribe and United States of America, to prove their title to the land in dispute. The defendants also have the burden of proving the allegations of their counterclaim seeking quiet title relief. As discussed in the Memorandum Opinion on file herein, this Court concludes that neither plaintiffs nor defendants are benefitted by any presumption or other transfer of the burden of persuasion, and that this Court's findings are supported in this case by a clear and fair preponderance of all of the evidence.

IV.

The plaintiffs failed to sustain their burden of proving that any sudden change of the Missouri River channel occurred in the Blackbird Bend area detaching a block of Omaha Indian Reservation land from the Nebraska bank to the Iowa bank, which land was capable of identification as such, either during the period from 1867 to 1879, 1906 to 1923, as contended by the plaintiffs, or at any other time material herein.

V.

The defendants on the other hand, by their evidence have proven that the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River and occupied by the bed thereof and that at the same time new land was added to the Iowa riparian land, from the owners of which defendants derive their title, by the gradual

process of deposition within the Blackbird Bend area and specifically the land within the Barrett Survey to the 1943 Nebraska-Iowa compact line.

At this point two observations about this litigation are in order: First, the *crucial* factual issues in dispute are relatively few; in fact, the testimony of the defendants' experts and the government's expert can to a large extent be reconciled. Secondly, there is at the core of this litigation a sharp dispute as to the legal classification of certain river movements which the evidence reveals. This is a lawsuit in which certain findings of fact, even if agreed upon, would not lead in the minds of all parties concerned to a definite legal conclusion; *i. e.* that either an avulsion or an accretion took place at key times in history at particular places on the Missouri River. It appears in this case that even if findings of fact could be agreed upon, the legal conclusions to be drawn from them would be vigorously disputed. This Court believes that a discussion of this problem of fitting the evidence into legal categories can make this Court's opinion more comprehensible. The dimensions of what is essentially a legal dispute are easily lost amid the wealth of evidence which was elicited to support very specific findings of fact.

The events which the Court is obligated to reconstruct occurred long ago and they were events of nature; so far as we know these events were not observed in their entirety by any person who could today be a witness concerning them. Indeed, there is some lay testimony that constitutes direct evidence relative to river movements early in this century, but none of this evidence in and of itself is sufficient for the construction of an overview of

the river's actions at key times in history in the Blackbird Bend area. Yet an overview, not mere fragments of data, is a necessary predicate for conclusions in this case. Fact-finding must be, therefore, the creation of a synthesis of the fragments of data that pertain to the natural history of the Missouri River in the Blackbird Bend area.

In the process of pulling together the extensive and complicated evidence presented in this case, it becomes apparent that the movements of the Missouri River have not been so clean and precise that they easily fall into the legal categories conveyed by the terms "accretion" and "avulsion". This is *not* to suggest that at this time, after thorough examination of the evidence and the law, this Court holds an ambivalent attitude as to what legal conclusions should be drawn. This Court is convinced that one particular set of conclusions can be squared with the evidence far better than other proposed conclusions. We do suggest, however, that where the law demands precise concepts, nature has supplied the rather erratic behavior of the Missouri River. Holding up the concepts of accretion and avulsion and matching these concepts with our reconstructed view of former river movements is no easy task. The task requires intense analysis and very precise conceptual thinking.

The complexity of the evidence has required this Court to reflect upon the precise meaning of the terms "accretion" and "avulsion" in light of the evidence elicited in this case. In so doing it has become apparent that rendering a decision on the merits means not only that certain proposed findings of the plaintiffs must be re-

jected but also that certain erroneous legal thinking of plaintiffs must be rejected. Both government counsel and the Tribe's counsel have proceeded throughout this lawsuit with certain presuppositions as to what is required to prove either an accretion or an avulsion. These presuppositions are, in part, at variance with the legal meaning of the terms accretion and avulsion as this Court understands them. These differences in conceptualizing the requirements for a conclusion of accretion or avulsion are slight, but they are crucial and must be noted if the reasons for this Court's conclusions are to be comprehended.

The differences between the government's theory and the requirements of the law can best be illustrated by concentrating on the meaning of the term "avulsion". The government's pretrial statement of its theory of the case studied in conjunction with the testimony elicited by the government from its expert leads us to the following conclusion: the government's theory rests upon the assumption that the foremost and perhaps the single criterion for classifying a river movement as an avulsion is a sudden movement of the thalweg; thus under the government's theory an avulsion can be defined with no reference whatever to river banks or other land forms. That assumption, we believe, cannot withstand critical scrutiny.

Assume that a stream evolves to have a braided character, *i. e.* it has several channels of various depths, the deepest of which contains the thalweg. According to the government's theory of avulsion, if the deepest channel begins to fill in with silt, then a point in time will come when another channel is deeper; hence, a new thal-

weg will suddenly appear. This sudden movement of the thalweg or emergence of a new thalweg, it is asserted, has the character of a "jump" and indicates that an avulsion has taken place.

The government's theory would compel us to recognize "jumps" (*Ergo* avulsions) under many other circumstances. If the thalweg were hard against one bank of a river prior to an inundation and subsequent to the inundation appeared suddenly at another place in the river, the government's theory would no doubt necessitate the conclusion that an avulsion had occurred in view of the obvious fact that the thalweg had moved suddenly, in a few hours or a few days, to a new location.

That idea of an avulsion is innovative and thought-provoking but it cannot be reconciled with the common law legal concepts which we discussed earlier in this opinion. The government's criterion for recognizing an avulsion, a sudden movement of the thalweg, is inadequate to provide the conceptual framework for the resolution of this dispute if the Court adheres, as it must, to the common law concepts of accretion and avulsion.

The reasons are obvious. The government would have us recognize avulsions in a variety of river movements that leave no commonly accepted indicia of an avulsion, particularly land in place and an abandoned channel. Moreover, if the indicia of avulsion are cast aside, then the distinction between accretion and avulsion will become virtually meaningless.

The experts uniformly state that lateral river movements do not occur at a constant rate, for example, X

feet per hour or per day. Due to the tremendous number of variables involved, movements of the thalweg may be sudden, seemingly erratic, and in some cases not immediately perceptible to a lay observer. Carrying the government's theory to its logical conclusion, many river movements historically known as accretions would be thrown over into the category of avulsions insofar as they result from river movements that are sudden and where the movement of the thalweg could rightly be characterized as a "jump".

In short, even if the question of government counsel (whether the river was jumping around at the times and places in question) were answered in the affirmative, the conclusion of an avulsion would not necessarily follow. We will not go so far as to assert that an avulsion can only occur when there is a chute cut-off or a neck cut-off, but it is necessary that identifiable land in place and evidence of an abandoned channel be visible subsequent to a river change before it can be classified as an avulsion.

The government has, no doubt, derived this theory of an avulsion from a more "scientific" analysis of the river movements than that which underlies the common law. From our vantage point at this time, it seems that if plaintiffs were to prevail in this suit, it could only have been by convincing this Court that this more "scientific" view of river movements, which would require constant attention to only the position of the thalweg, would be somehow harmonious with the common law. The evidence is simply insufficient to support findings that the traditional indicia of an avulsion existed at the key points in time.

The differences between this Court's analysis of the law and the views of the Tribe's counsel can best be illustrated by focusing upon the meaning of the term "accretion". It seems to this Court that the vigorous cross-examination of the defendants' experts by the Tribe's counsel revealed an operating assumption that involves the concept of accretion; namely: Tribe's counsel assumes that a conclusion of accretion can never be made without a finding of continuity and contiguity between allegedly accreted lands and lands to which accretions allegedly attached. We find no error in this assumption itself, but do state that the terms "continuity" and "contiguity" themselves need to be analyzed. In this area the need for conceptual clarity is greater than ever.

Under the common law, as it is used in Iowa and Nebraska, a conclusion that accretion has occurred can only be made when land attaches to a shoreline; indeed, it is the growth of the shoreline that constitutes accretion. The accreted lands must, according to a commonly accepted doctrine, be above the ordinary high water mark. Therefore, continuity and contiguity are required and up to this point the reasoning of Tribe's counsel parallels that of this Court.

However, it appears that the view of Tribe's counsel is slightly but crucially at variance with this Court's understanding of what is required to prove an accretion. In this Court's view the twin concepts of continuity and contiguity do *not* require either the absence of any and all surface water on all accretion lands at all times subsequent to attachment nor do they require a level, uniform extension of the shoreline by homogeneous soil-building materials.

First, we will consider the significance, if any, of water on lands alleged to be accretions. It is clear to this Court that the process of accretion can and often does occur in such a manner that puddles, sloughs and stagnant back-water of various common and technical descriptions are present for many years on low-lying portions of accreted lands and often at the juncture of accreted lands and lands to which they attach. The water may be the result of rainfall, a high water table or periodic inundation. Whatever its origin, the presence of water part of the time or even permanently at some sites does not in and of itself defeat the conclusion that an accretion has occurred. There can be contiguity and continuity of the land despite the presence of some water. As long as the mass of land which is purportedly an accretion is attached to the former shoreline in such a manner that it appears to our common senses to be a growth of that old shoreline, then the land is accretion land.

It is this Court's view that the lands within the Barrett Survey area are now and for some time have been both continuous with and contiguous to the former Iowa shoreline. This means that they are accretion lands despite the presence of water which now and in earlier times interrupted to some degree the otherwise uninterrupted extension of the land.

We must also consider the question of whether the heterogeneous character of the soils throughout the Barrett Survey together with the vestiges of former river channels in that area defeat the conclusion that the area was formed by accretion. The answer is an unequivocal negative.

The soil throughout the area is *not* of a homogeneous composition. By the use of early aerial photography vestiges of former channels *can* be traced. This means that the Missouri River, to no one's great surprise, did not move at a uniform rate of speed at all times and did not pile up soils of a uniform character in the process. Yet, these facts do not negate the conclusion that the Barrett Survey area as it exists today is the result of a process of accretion; even less do they tend to prove an avulsion. This evidence is entirely consistent with the theory advanced by defendants. The key again is the growth of the shoreline. How that growth occurred, whether steadily or by jumps, whether uniformly or unevenly, is of no concern.

VI.

Judgment will be entered in favor of the defendants, RGP, Inc., Roy Tibbals Wilson, Charles E. Lakin, State of Iowa, Harold M. Sorenson, and Travelers Insurance Company quieting title in them to the Barrett Survey land in controversy in these cases claimed by them respectively as against the plaintiff, Omaha Indian Tribe.

VII.

The preliminary injunction herein granted on June 5, as extended and supplemented, will be set aside.

VIII.

There is no basis for an injunction against Travelers Insurance Company as prayed in 4024 either to put the Indians in possession or to enjoin against interfering

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with possession and use by plaintiffs or as prayed in 4067 to enjoin from interfering with plaintiff's possession or denying access to or preventing harvest by plaintiffs.

IX.

Travelers Insurance Company has a valid and enforceable first mortgage lien against the land owned by RGP, Inc. which is superior to any rights of the plaintiffs.

The foregoing shall constitute this Court's findings of fact and conclusions of law, and this Court's Memorandum Opinion on file herein shall be deemed to be the basis for its conclusions of law.

Dated this 2d day of May, 1977.

By the Court:

/s/ Andrew W. Bogue
United States District Judge

Attest:
William J. Srstka, Clerk

By.....Deputy

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APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

April 29, 1977

ANDREW W. BOGUE
U. S. District Judge
318 Federal Building
U. S. Courthouse
Rapid City, South Dakota 57701

Mr. William H. Veeder
818 18th Street, N.W.
Washington, D.C. 20006

Mr. James J. Clear
Department of Justice
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Mr. Lyman L. Larsen
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Mr. Maurice B. Nieland
300 Toy National Bank Bldg.
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922 Douglas Street
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Mr. Edson Smith
3535 Harney Street
Omaha, Nebraska 68131

Mr. Jack W. Peters
501-511 Park Building
Council Bluffs, Iowa 51501

Mr. Bennett Cullison, Jr.
Harlan, Iowa 51537

Re: USA v. Roy Tibbals Wilson, et al., No. C 75-4024
Omaha Indian Tribe, etc. v. Harold Jackson, et al.
No. C 75-4026 Omaha Indian Tribe, etc. v. Agricultural Industrial Investment Company, et al., No. C 75-4067

Gentlemen:

MEMORANDUM OPINION

This is a memorandum opinion prepared and filed by the Court for the purpose of setting out this Court's resolution of the choice of law problems presented by these consolidated Blackbird Bend-Barrett Survey Area cases. As will be discussed below, the choice of law problems are of primary importance in dealing with the allocation of the burden of persuasion in these cases, but would not be determinative of the general definitions of the terms accretion and avulsion.

I.

Generally, questions of title to land situated within a state are governed by that state's law, regardless of whether such questions are being litigated in state or federal courts. *Mason v. United States*, 260 U.S. 545, 43 S.Ct. 200 (1923). This general proposition extends not only to questions of legal title *per se*, but also to questions concerning the rights of riparian landowners to accretion lands. *Joy v. City of St. Louis*, 201 U.S. 332, 26 S.Ct. 478 (1906). The rule established by the case law has been incorporated into a codification known as the Rules of Decision Act, 28 U.S.C. § 1652, which provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The above-quoted statute does apply to disputes over title to land. *Mason v. United States*, 260 U.S. 545, 43

S.Ct. 200 (1923). Thus, unless federal law provides otherwise, state law would provide the rule of decision for this case. It should be noted at this point that, in the event state law does in fact supply the rule of decision, Fed. R. Evid. 302 would apply as well. Fed. R. Evid. 302 provides:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with state law.

See also Cities Service Oil Co. v. Dunlop, 308 U.S. 208, 60 S.Ct. 201 (1939).¹

Before any discussion of the issue whether a provision in the Constitution, treaties or congressional enactments compels an exception to the rule that state law controls disputes over title to real property, the problem of which state law would apply should be dealt with. The land involved in this litigation was on the Nebraska side of the river as of 1867. The thalweg of the Missouri River was the Nebraska-Iowa boundary prior to 1943. *Nebraska v. Iowa*, 143 U.S. 359, 12 S.Ct. 396 (1892). Prior to the 1943 Nebraska-Iowa Boundary Compact, the movements of the river would be directly relevant (indeed, any accretion river movements would be controlling) on the location of the Nebraska-Iowa boundary. *Id.* With

¹ While the defendants here are urging the use of Iowa law in order to avail themselves of Iowa's presumption in favor of accretion, it is at least arguable that federal law may recognize a similar presumption. *See Mississippi v. Arkansas*, 415 U.S. 289, 94 S.Ct. 1046 (1974), *cf.* 78 Am. Jur. 2d 874, Waters § 427 (1975).

the 1943 Nebraska-Iowa Boundary Compact, one point became firmly established: regardless of who owns the Blackbird Bend area within the 1867 Barrett Survey Meander line, that area is on the Iowa side of the boundary. The difficulty here of course lies in the fact that significant changes in the location of the river occurred prior to 1943. The general choice of the problems created by this situation came to a halt in the case of *Nebraska v. Iowa*, 406 U.S. 117, 92 S.Ct. 1379 (1972). In that case the Supreme Court began by adopting the Special Master's finding

... that by 1943 the shifts of the river channel had been so numerous and intricate, both in its natural state and as a result of the work of the Corps of Engineers, that it would be practically impossible to locate the original boundary line. 406 U.S. at 119, 92 S.Ct. at 1381.

The 1972 Nebraska-Iowa case began when Iowa claimed thirty separate parcels which were wholly on the Iowa side of the 1943 compact line. For purposes of resolving the choice of law issues, the Court divided the thirty parcels into two groups. The classification was based on whether the land in the parcels was formed before or after 1943. With respect to the parcels which were found by the Special Master to have been formed after 1943, the Court held that Iowa law would govern title disputes, except that claimants to those areas would have the opportunity to show good title under Nebraska law as of the 1943 Compact date. Significantly, the Court found that Blackbird Bend was one of the areas formed

after 1943. 406 U.S. 117 at 120 n. 4, 92 S.Ct. 1379, 1382 (1972).²

Thus, under the 1972 *Nebraska v. Iowa* decision, Nebraska law would provide the rule of decision for land disputes as to river changes occurring prior to 1943, and Iowa law would provide the rule of decision for changes occurring after that date. These guidelines would clearly apply if all of the parties to this lawsuit were private, non-governmental entities. Thus the issue to be resolved is whether the fact that the United States as trustee and the Omaha Indian Tribe as beneficiary are claimants to the land involved in this lawsuit creates an exception to the general rule that state law controls in land litigation.

Contrary to the government's assertion, the fact that the United States, as trustee for the Tribe, claims the land involved in this lawsuit does not make federal law controlling. See *Mason v. United States*, 260 U.S. 545, 43 S.Ct. 200 (1923); see also *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 595, 93 S.Ct. 2389, 2398 (1973); *Wright*, 14 *Federal Practice and Procedure*, 141 N. 4 (1976). The case of *Hughes v. State of Washington*, 389 U.S. 290, 88 S.Ct. 438 (1967), might arguably support an argument that the presence of the United States as a claimant converts the case to one governed by federal law. However, it appears that *Hughes* is limited to its somewhat unique factual situa-

² Of course, this finding is not *res judicata* as to the factual issues raised in the instant case, but serves only to help arrive at a practical resolution of the choice of law problems.

tion, which involved ocean-front property and thus was closely involved with the nation's international boundaries. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, — U.S. —, 97 S.Ct. 582, 590 n. 6 (1977).³

Further, the majority of cases which have decided the question have turned to state law to resolve questions of land ownership when Indian tribes are involved as claimants. In the case of *Fontenelle v. Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb. 1969), *aff'd* 430 F. 2d 143 (8th Cir. 1970), Nebraska law was applied in an accretion-avulsion dispute between the Omaha Indian Tribe and private claimants who were descendants of, and traced their title back to, Logan Fontenelle, who had been a chief of the Omahas. See also *Herron v. Choctaw and Chickasaw Nations*, 228 F.2d 830 (10th Cir. 1956), which applied Oklahoma law in a title dispute between an Indian tribe and private claimants. Finally, the case of *Francis v. Francis*, 203 U.S. 233, 27 S.Ct. 129 (1906), upheld the determination of the Michigan Supreme Court that an Indian treaty reserved certain lands to individual Indians in fee simple, thus giving the individual Indians and their heirs the right to convey the land without restriction and making title in the land subject to an adverse possession claim. In *Francis*, the Supreme Court stated:

. . . the construction of the treaty here involved, whereby the respective Indians named in its 3d ar-

³ In any event, *Hughes* was concerned only with the question whether a title included accretion lands deposited subsequent to issuance of a patent, not whether accretion had in fact occurred.

tiele are held to have acquired by the treaty a title in fee to the land reserved to the use of themselves, has become a rule of property in the state where the land is situated. That rule of property should not be disturbed, unless it clearly involves a misinterpretation of the words of the treaty of 1819.

In short, the fact that the United States and the Omaha Indian Tribe are claimants to the Blackbird Bend area within the 1867 Barrett Survey meander line does not, standing alone, alter the general rule that the law of real property ownership is found in the law of the state in which the property in question is situated.

Under the Rules of Decision Act, 25 U.S.C. § 1652, the Constitution, treaties and Acts of Congress must be examined in each case to determine whether federal law supplants state law as the rule of decision.

The Constitution contains nothing which would compel an exception to the general rule. While it may be that the commerce clause, Article I, § 8, Cl. 3, would empower Congress to mandate the use of federal law in cases such as this, Congress has not done so. It seems clear that neither the terms of the commerce clause nor reasonable inferences to be drawn from those terms compel abandonment of state law in this case.

An examination of the three treaties received into evidence which relate to the Omaha Tribe (Treaty with the Sauk and Foxes, et al., 1830; Treaty with the Oto, et al., 1836; Treaty with the Omaha, 1854), together with the "Documents of Selection" (under which the Omaha Tribe selected their reservation lands) discloses that nothing in these treaties and documents precludes the appli-

cation of state law. The only express limitations which the treaties place upon disposition of the lands are the restraints against alienation familiar to Indian law. To the extent that they supplant state law, such restraints do create an exception to the general rule that state law controls the tenure, transfer, control and disposition of real property. *Sunderland v. United States*, 266 U.S. 226, 45 S. Ct. 64 (1924).

Research has disclosed no Act of Congress which displaces state law with federal law in cases such as this. While there need not be an express repudiation of state law, there must be some indication of a need for the use of federal law, such as a case where federal land acquisition has been part of an extensive federal regulatory program. *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 93 S. Ct. 2389 (1973). This Court is unable to discern any federal policy broad or strong enough to supplant the strong local policy concerning title to land. This case should be governed by state law. Virtually all of the analogous cases have used state law. In short, this case should be governed by the choice of law principles laid down in *Nebraska v. Iowa*, 406 U.S. 117, 92 S. Ct. 1379 (1972).

II.

Nebraska law recognizes and adheres to the principles developed at common law for the resolution of title and boundary disputes which arise when the contour of riparian land has been changed by a river's movements. Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion

and accretion, the boundary follows the movements of the river. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647 (1935). On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel. *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N.W. 328 (1914). The jurisdiction of Nebraska applies these principles to the movements of the Missouri River. *DeLong v. Olsen*, 63 Neb. 327, 88 N.W. 512 (1901).

Nebraska law generally defines the process of accretion as the slow gradual and imperceptible addition by a body of water of solid material, made up of silt and sediment, against and to a shore line. See *Mercurio v. Duncan*, 131 Neb. 767, 269 N.W. 901 (1936). Accretions become attached to and extend an existing riparian shore line. *Jones v. Schmidt*, 170 Neb. 351, 102 N.W. 2d 640 (1930). Nebraska law also applies the law of accretion (*i.e.* that accretion land becomes the property of the riparian landowner of the land to which it attaches) to land uncovered by a process known as reliction. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647 (1935). Reliction is defined as the process by which a gradual recession of water from a shore line uncovers land. *Id.*

One of the indicia of accretion is that the water's deposit of the silt and sediment along the shore line has been gradual and imperceptible. *Mercurio v. Duncan*, 131 Neb. 767, 269 N.W. 901 (1936). Nebraska law has objectively defined the terms gradual and imperceptible

to mean that, while an observer of riparian land could see from time to time that erosion had taken place and that deposits had been made, the process of erosion and deposition could not be observed while it was actually taking place. *Gill v. Lydick*, 40 Neb. 508, 59 N.W. 104 (1894). The fact that a gradual and imperceptible deposit of alluvion is one indication of accretion does not, however, mean that Nebraska law recognizes the length of time involved in a river movement as a strong element of an accretion case. This point is particularly important in the resolution of a dispute over whether a change in the location of the Missouri River has been by accretion or by avulsion. In the case of *DeLong v. Olsen*, 63 Neb. 327, 88 N.W. 512 (1901), the Nebraska Supreme Court rejected a contention that the law of accretion should not apply to the Missouri. The contention rejected in *DeLong* was based upon the generally acknowledged phenomenon that even erosive changes in the channel and banks of the Missouri River are too rapid and too perceptible to allow the land formed thereby to be termed accretion. See *Nebraska v. Iowa*, 143 U.S. 359, 12 S.Ct. 396 (1892). In the case of *Kinkead v. Turgeon*, 109 N.W. 744 (1906), *vacating* 74 Neb. 573, 104 N.W. 1061 (1905), the Nebraska Supreme Court discussed the vagaries of the Missouri River, and the following language of the *Kinkead* Court demonstrates that the amount of time involved in a river's change does not control the decision of whether the change was accretive or avulsive:

It is a matter of public knowledge of which the court will take judicial notice that that great river in this locality takes its course through a wide valley

composed in the main of loose, sandy, and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect, as, even in a single day, to undermine the same and cause large masses of soil to fall into the stream be disintegrated and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed and left the former peninsula with the abandoned bed entirely across the river upon the eastern or northern bank and thus physically dissevered from the state of Nebraska and conjoined to Dakota, Iowa or Missouri. (Citations omitted.) 109 N.W. at 146.

Thus it may be said that, under Nebraska law pertaining to the Missouri River, the fact that a change in the channel and bank of the Missouri River has not taken place gradually in terms of an extended period of time does not dictate a finding that the change has not been wrought by an accretion. A case in point is *Conkey v. Knudson*, 143 Neb. 5, 8 N.W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N.W. 2d 290 (1942). *Conkey* involved a dispute among riparian claimants over land created when the Missouri River had, in the area in question, moved its channel over a mile north and east of its former location during a single high water period caused by a large ice jam. The trial court had determined that an accretion had taken place. In the first appeal the Nebraska Supreme Court concluded

that the determination of accretion was error, noting that the change:

. . . was not gradual and imperceptible, but definite, sudden and certain as to time and extent. 4 N. W. 2d at 301.

In the first appeal the Court was so certain of its conclusion that an accretion had not taken place that it termed this conclusion as supported beyond a reasonable doubt by the evidence. 4 N. W. 2d at 295. Upon rehearing, the Nebraska Supreme Court reversed itself and vacated its former opinion. 8 N. W. 2d 538 (1943). In its re-examination of the case, the Court considered evidence that the vegetation in the area in question had grown there only since the change had taken place. The Court noted that the evidence tended to support a finding of either an accretion or a reliction, since

The record does not disclose from what land, if any, the area was cut off by avulsion, or the situation existing from which it might be reasonably inferred that it could be identified as the same land that had washed away from some other survey tract or plot marked out on the river. 8 N. W. 2d at 541.

The Court further stated that the fact that the river had sought an entirely new channel as the waters receded from the flood did not rebut the conclusion that an accretion had occurred. Finally, the Court noted that, in cases involving the Missouri River, the transition of former river bed to arable land often takes place more rapidly after an accretion than after an avulsion, because avulsions often leave lakes which may exist for many years in the former channel bed.

One common thread running through the Nebraska cases involving accretions is the requirement that the river have moved its channel and banks through a process of erosion on one bank and deposition of silt and sediment on the opposite bank. See *Wiltse v. Bolton*, 132 Neb. 354, 272 N. W. 197 (1937). In other words, the definition of accretion requires that a river, in the process of moving its channel location from one place to another, erode the land between its present and former channels and replace the eroded land with alluvion. In fact, where a river has changed its channel slowly without eroding the land in between, Nebraska does not apply the law of accretion. *State v. Ecklund*, 147 Neb. 508, 23 N. W. 2d 782 (1946). *Ecklund* held that

. . . where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream. (Quoting *Commissioners of Land Office of Oklahoma v. United States*, 270 F. 110, 113 (8th Cir. 1920) 23 N. W. 2d at 789-790.

Thus, it seems that, while the consistently intoned Nebraska definition of accretion includes the terms "grad-

ual and imperceptible," the process of excavation, or erosion and replacement by silt and sediment from upstream, is actually the linchpin of the application of the law of accretion. The process of accretion may be either rapid or gradual, at least in cases involving the Missouri River.

Nebraska law generally defines avulsion as a sudden departure by a river from its former channel and location in either a newly formed channel or pre-existing slough or high water channel. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935); *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). While the key indication of an accretion is erosion, the key indication of an avulsion is that the land which is displaced in relation to the river, or remains while the river displaces itself, can be identified as the same piece of land as existed before the change. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935); *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). For example, upon rehearing in *Conkey v. Knudson*, 143 Neb. 5, 8 N. W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N. W. 2d 290 (1942), the Court noted that one of the factors demonstrating that an accretion and not an avulsion had taken place was the absence of evidence showing that the land in question was identifiable as having remained intact through the substantial change in the channel of the river.

While the factor of time is not controlling in a finding of accretion, Nebraska law recognizes that avulsions are characteristically sudden and rapid in terms of time. *Frank v. Smith*, 138 Neb. 382, 293 N. W. 329 (1970). Compare *State v. Ecklund*, 147 Neb. 508, 23 N. W. 2d 782 (1946).

The Nebraska definition of avulsion often refers to an abandonment of a river's old channel. *e.g. Frank v. Smith*, 138 Neb. 382, 293 N. W. 329 (1940). The use of the term "abandon" implies that, in cases of avulsion, the old channel remains relatively intact and often continues to hold water for several years following the avulsive event. See *Conkey v. Knudson*, 143 Neb. 5, 8 N. W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N. W. 2d 290 (1942). This implication finds further basis in the fact discussed above that accretion is characterized by erosion. In other words, while an accretion would likely destroy the riverbank on the side of the direction to which the river moves, an avulsion is more likely to leave both sides of its banks relatively intact. Of course, where a bank is composed of point bar deposits, or sand and sediment, it may be more difficult to determine whether a bank and adjacent riparian land has remained intact through a change of a river channel. This Court does not mean to imply that movement by accretion, particularly one which occurs rapidly, will not leave behind sloughs or marshes which can be identified as remnants of the former channel. Because river movements, and accompanying scour, erosion and deposition, are not uniform, accretion deposits are not uniform. Therefore the river may not entirely fill in its former channel. See *Rupp v. Kirk*, 231 Iowa 1387, 4 N. W. 2d 264 (1942).

It may be noted that Nebraska law places the burden of persuasion upon one who seeks to quiet title, and that burden requires that the strength of the title of the one seeking to quiet title be shown, rather than weakness in the titles of adverse claimants. *Mitchell v. Beerman*, 175 Neb. 616, 122 N. W. 2d 525 (1963); *Bissel v. Fletcher*, 27

Neb. 582, 43 N. W. 350 (1889). The burden is so allocated even though a quiet title action is based on a claim of accretion as against adverse claims of avulsion. *Jones v. Schmidt*, 170 Neb. 351, 102 N. W. 2d 640 (1960). Iowa law, on the other hand, recognizes a strong presumption favoring accretion as opposed to avulsion. *Kitteridge v. Ritter*, 172 Iowa 55, 151 N. W. 1097 (1915).

Another significant difference between Nebraska and Iowa law which is relevant to this case is that under Iowa law the State of Iowa claims the beds of, and islands within, all navigable rivers within the state. *Holman v. Hodges*, 112 Iowa 714, 84 N. W. 950 (1901). See also *Nebraska v. Iowa*, 406 U. S. 117, 92 S. Ct. 1379, 1382 (1972). Nebraska law, on the other hand, gives a riparian owner title to the center of the main channel. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935). Counsel for Plaintiffs herein make much of this distinction, arguing that Defendants cannot prove title by accretion unless they can demonstrate that the claimed accretion lands were attached to the riparian bank at a point above the ordinary high water mark. See *Dartmouth College v. Rose*, 133 N. W. 2d 687 (1965). However, assuming a failure of Defendants' proof on this point, that failure alone would not assist the Plaintiffs in their quiet title action, since they must demonstrate the strength of their title to prevail, and cannot rely on an alleged weakness in Defendants' title. See 65 *Am. Jur.* 2d 207-208,

Quieting Title § 78 (1972).⁴ Such a failure of proof could at most adversely affect the Defendants' counterclaims to quiet title, upon which Defendants bear the burden of persuasion.

Apart from the differences just discussed, this Court wishes to note that it has researched both federal and Iowa laws of accretion and avulsion, and found that, as to definitions of those terms with respect to the Missouri River, there are no significant differences among federal, Iowa and Nebraska laws which are relevant to this case. See *Kitteridge v. Ritter*, 151 N. W. 1097 (Iowa 1915); *Wilcox v. Pinney*, 98 N. W. 2d 720 (Iowa 1959); *Nebraska v. Iowa*, 143 U. S. 359, 12 S. Ct. 396 (1892). Indeed, Nebraska law has relied heavily on federal law in formulating its definitions of accretion and avulsion. See, e.g. *Kinthead v. Turgeon*, 109 N. W. 744 (Neb. 1906), *vacating* 74 Neb. 573, 104 N. W. 1061 (1905); *DeLong v. Olsen*, 63 Neb. 327, 88 N. W. 512 (1901); *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104 (1894).

III.

The remaining question to be discussed in this memorandum concerns the allocation of the burden of persuasion. As noted above, generally a claimant, whether a Plaintiff or a counterclaiming Defendant, has the burden

⁴ Thus, it has been stated that a Plaintiff has no interest in land if he himself does not own it, and that whomever the court determines to be the true owner is of no concern to him. Having failed to establish title in himself, he cannot complain of an insufficiency of the evidence upon which the court adjudged title to be in the defendant. (Footnotes omitted.) *Id.* at 208.

of persuasion in a quiet title action as to the strength of his or her own title. At times such a claimant may be aided in overcoming this burden by certain applicable presumptions.

In this case the Defendants urge that Iowa law applies and that consequently their evidence is buttressed by Iowa's presumption in favor of accretion. *See Kitteridge v. Ritter*, 151 N.W. 1097 (Iowa 1915). Because, under the case *Nebraska v. Iowa*, 406 U.S. 117, 92 S. Ct. 1379 (1972) Plaintiffs are entitled to rely on Nebraska law (which does not recognize presumptive accretion) in proving their title, this Court rejects Defendants' arguments on this point and declines to encumber Plaintiffs with the task of rebutting a presumption in favor of accretion.

Plaintiffs likewise contend that their case is assisted by reason of a reallocation of the burden of persuasion. The basis for their argument on this point is 25 U.S.C. § 194, which reads:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous ownership.

The above-quoted provision is, by its terms, triggered when an Indian person in a title dispute has offered evidence to show previous possession or ownership of the land in question. In this case, Plaintiffs could make out such a *prima facie* case by establishing that the land now within the Barrett Survey Line of the Blackbird Bend

Area is land (or accretions to such land-in-place) left undisturbed and in place through and following an avulsive change of the river channel. If Plaintiffs establish this fact, however, they have not only triggered the application of 25 U.S.C. § 194 but also have proved their entire case and established their right to relief in the form of a decree quieting title. On the other hand, if the land now within the Barrett Survey line is land which has accreted to the Iowa shore as Defendants claim, then the land which the Tribe possessed and owned at the time the Omaha Reservation was established has been washed away and replaced. If the evidence supports a finding that the land in question is accretion land to the Iowa shore, then Defendants have proved their case as well as overcome any burden which 25 U.S.C. § 194 might place upon them. In that event, the land now within the Barrett Survey Line simply would not be the land which the Tribe once possessed and owned, although it would occupy the same location. In short, the question whether 25 U.S.C. § 194 applies in this case is inextricably entwined with the merits.

In this connection, it should be noted that Defendants, or their predecessors in title, remained in continuous undisturbed possession of the land in question for over forty years. The Tribe, on the other hand, acquired peaceful possession only with the entry of a preliminary injunction order June 5, 1975. Prior to 1975 various officials and members of the Tribe had on several occasions attempted to enter and occupy the land in the hope of using the Tribe's sovereign immunity from suit to bar ejectment actions and thus obtain possession of the land. In light of these facts this Court is unwilling to find that

the Tribe has had possession of the land of a sufficient nature and degree to trigger the shift in the burden of persuasion apparently contemplated by 25 U. S. C. § 194.

In summary, this Court concludes that 25 U. S. C. § 194 is not applicable to this case. Even if it were, the proof necessary to trigger it would be the same proof which, by itself, would establish the Tribe's title to the land. Neither the parties nor this Court have been able to locate any directly relevant case authority which construes 25 U. S. C. § 194 in a situation like this. *cf. United States v. Sands*, 94 F. 2d 156 (10th Cir. 1938); *Felix v. Patrick*, 36 F. 457 (8th Cir. 1888), *aff'd* 145 U. S. 317, 12 S. Ct. 862 (1892). Thus, this case appears to be one of first impression. It seems to this Court that an application of 25 U. S. C. § 194 to an accretion-avulsion case such as this would be unreasonable and circuitous in view of the manner in which that application would mesh with the merits.

The practical result of this Court's refusal to apply either the Iowa presumption of accretion or 25 U. S. C. § 194 is as follows: 1) in order to obtain a decree quieting title in them, Plaintiffs have the burden of persuasion as to facts which establish their title; 2) similarly, Defendants bear the burden of persuasion on their counterclaim to quiet title; and 3) failure of either of the two groups of claimants to sustain its burden of proof does not, standing alone, entitle the other side to relief. This Court wishes to state, however, that, after thorough and careful review of the evidence, it is satisfied that its findings of fact are supported by a preponderance of the evidence and would not be altered by any different allocation of the burden of persuasion.

This Court has filed, in separate documents, its findings of fact and conclusions of law, and decree. This memorandum opinion has been prepared and filed for the purpose of expressing the legal analysis used by the Court in arriving at the rules of law applied in this case.

BY THE COURT:

ANDREW W. BOGUE, JUDGE

UNITED STATES DISTRICT COURT

D1

APPENDIX D

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

No. C 75-4024

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,
Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, organized Indian Tribe
pursuant to Act of June 18, 1934 (48 Stat. 984)
as amended,
Plaintiff,

vs.

HAROLD JACKSON and OTIS PETERSON
and the DISTRICT COURT OF IOWA IN AND
FOR MONONA COUNTY,
Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, etc.,
Plaintiffs,

vs.

AGRICULTURAL INDUSTRIAL
INVESTMENT COMPANY, et al.,
Defendants,

D2

DECREE

(Filed May 4, 1977)

**IT IS HEREBY ORDERED, ADJUDGED AND
DECREED:**

1. Each and every one of the foregoing Findings of Fact and Conclusions of Law are by this reference made a part hereof.

2. The clear and convincing evidence is that the original "Barrett Survey" lands and accretions thereto have been entirely eroded and washed away by the erosive force of the river since 1867. The land in this litigation was not left by avulsive action of the river, but was formed by accretion to the riparian land on the Iowa side of the river, commencing sometime after 1867 and defendants' title is derived therefrom.

3. Plaintiffs' prayers for relief are hereby denied, and judgment is hereby given to the defendants on their counterclaims, and as between the defendants on the one hand and the plaintiffs on the other hand, title to the Barrett Survey land is quieted in defendants as their respective interests may appear.

4. All prior injunctions or orders of this Court to the contrary are dissolved.

5. The preliminary injunction entered June 5, 1975, which gave possession of the Barrett Survey area to the Omaha Indian Tribe is hereby vacated, dissolved and set aside.

6. All monies from plaintiffs' farming operations which have been deposited with the clerk of this court

are the property of the defendants as their interests may appear.

7. Causes numbered C-75-4024 and C-75-4026 and that portion of C-75-4067 involved in this trial are dismissed, without costs to either party.

Dated this 2nd day of May, 1977.

By the Court:

/s/ Andrew W. Bogue
United States District Judge

Attest:

William J. Srstka, Clerk

By.....Deputy

APPENDIX E

STATUTORY PROVISIONS INVOLVED

United States Code, Title 25

§ 194. *Trial of right of property; burden of proof.*

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

Derivation. Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143.

(1802)

Sec. 4. *And be it further enacted*, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States: or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: and if such offender shall

be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: *Provided nevertheless*, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

(1802)

Sec. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution.

An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683.

(1822)

Sec. 4. *And be it further enacted*, That, in all trials about the right of property, in which Indians shall be a party on one side and white persons on the other, the burden of proof shall rest upon the white person in every case where the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, sections 12, 16 and 22, 4 Stat. 729, 730, 731, 733.

(1834)

Sec. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution.

(1834)

Sec. 16. *And be it further enacted*, That where, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also*, That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

(1834)

Sec. 22. *And be it further enacted*, That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the

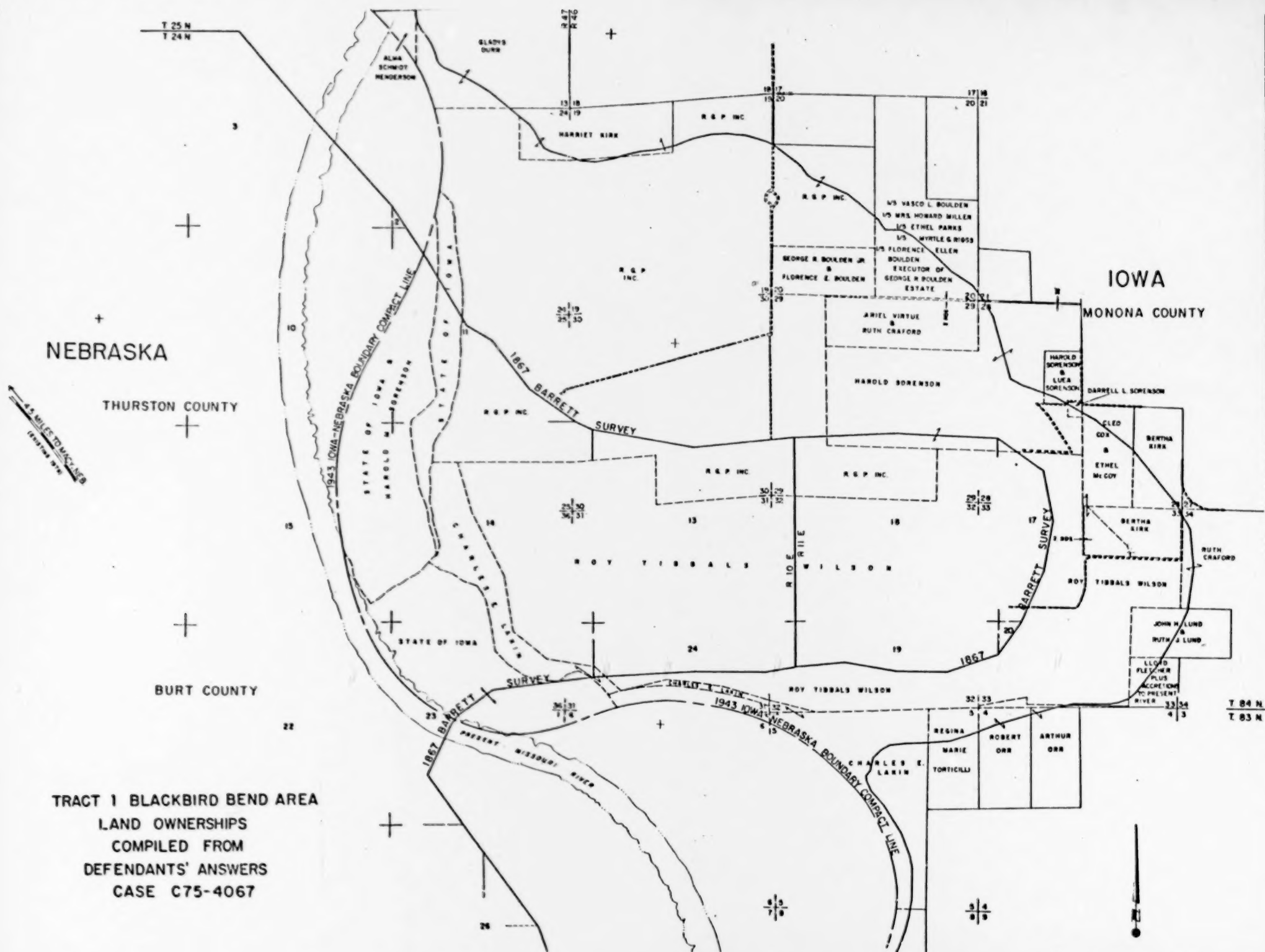
E4

white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

United States Constitution, Amendment V, Due Process Clause

No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

F1
APPENDIX F



PORTION OF TRIBE EXHIBIT 78

Supreme Court, U. S.
FILED

AUG 10 1978

MICHAEL RODAK, JR., CLERK

**In The
Supreme Court of the United States
October Term, 1978**

—o—
No. 78-160
—o—

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
Harold Jackson, Darrell L., Harold, Harold M. and Luea
Sorenson,

Petitioners,

No. 78-161

R. G. P. Incorporated, Otis Peterson, and
Travelers Insurance Company,

Petitioners,

No. 78-162

State of Iowa and State Conservation Commission of the
State of Iowa,

Petitioners,

vs.

Omaha Indian Tribe and United States of America,

Respondents.

—o—
**On Petitions for a Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit**
—o—

**BRIEF OF GORDON DAHL AND 81 OTHER FARM
OWNERS IN MONONA COUNTY AS AMICI CURIAE**
—o—

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(Names of 82 Amici listed inside of cover)

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Names of Amici submitting this Brief

Gordon Dahl, Barbara Dahl, Clara Grace Dahl, Vasco Boulden, Mrs. Howard (Edna Boulden) Miller, Ethel Parks, Myrtle G. Riggs, Florence Ellen Boulden, Cleo Cox, Ethel McCoy, John K. Craford, M. George Craford, Rose Ann Kane, Ruth Craford, Gladys Durr, Bertha Kirk, John H. Lund, Ruth J. Lund, Harriet Kirk, Arthur Orr, Robert Orr, George C. Ruth, Anena Ruth, Richard A. Ruth, Jean M. Ruth, Ferd Stangel, W. W. Virtue, Ariel Virtue, Richard L. Anderson, Karen Anderson, Hazel Clark, Chris Christensen, Harold B. Dufrene, Doris Dufrene, R. J. Everett, Myrva Everett, Alma Schmidt Henderson, J. B. Hicks, Trustee for Mildred C. Hicks, James Kent, Sue Kent, Lorraine Kutzler, Wallace G. Parker, Nadine Parker, Alice Parker, L. S. Raines, Donald L. Rupp, Roy R. Rupp, Lillian C. Rupp, Don E. Ruth, Joyce M. Ruth, Edna J. Sponder, Lillie Mae Stevens Estate, Roy T. Sorensen, Wilbur L. Stokley, Dan K. Weaver, Charles H. Truelsen, Duane J. Dowd, Donna C. Ford, Ray L. Grosvenor, Hazel I. Jacobson, Joan S. Jacobson Jensen, Wm. S. Jacobson, Minnie Marble, Harold Queen, Maude Seubert, John M. Ropes, Clyde H. Rush, Ethel Swan, Glen Swan, Grace Swan, Elmer Swan, Dorothy Weidner, Virginia Burns, Rose Loraditch, Mary Brennan, Phylis Nelson, Leslie Hickman, Shirley Fender, Robert Hickman, Dorothy Queen, Norman Queen and Charlotte J. Clark.

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In The
Supreme Court of the United States

October Term, 1978

—o—
No. 78-160
—o—

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
Harold Jackson, Darrell L., Harold, Harold M. and Luea
Sorenson,
Petitioners,

No. 78-161

R. G. P. Incorporated, Otis Peterson, and
Travelers Insurance Company,
Petitioners,

No. 78-162

State of Iowa and State Conservation Commission of the
State of Iowa,
Petitioners,

vs.

Omaha Indian Tribe and United States of America,
Respondents.

—o—
**On Petitions for a Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit**
—o—

**BRIEF OF GORDON DAHL AND 81 OTHER FARM
OWNERS IN MONONA COUNTY AS AMICI CURIAE**
—o—

The 82 individual farm owners whose names are listed inside of the cover respectfully submit this brief as *amici curiae* in support of the petitions for writ of certiorari filed in this case on behalf of petitioners Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson, R. G. P. Incorporated, Otis Peterson, Travelers Insurance

Company, State of Iowa and State Conservation Commission of the State of Iowa. All parties have signed a written consent to the filing of this brief pursuant to Rule 42.2.

STATEMENT

These amici adopt the sections of the Petition of Petitioners Wilson, Lakin, Jackson and Sorenson setting forth Opinion Below, Jurisdiction, Questions Presented, Constitutional and Statutory Provisions Involved and Statement of the Case. These amici supplement said Petition with a statement of their interests in this case and of their reasons this Court should grant the Petitions and review the decision of the 8th Circuit Court of Appeals.

STATEMENT OF INTERESTS OF AMICI CURIAE

These amici own 35 Iowa farms (approximately 6,500 acres) lying to the east, north and south of the 2,900 acres in the instant case. Substantially all of their land lies outside the Barrett Survey of 1867 which the parties agreed accurately prescribed the boundaries of the 2,900 acres in the original reservation. The district court severed the 2,900 acres within the Barrett Survey for the separate trial which has been held in the instant case, and the Tribe's claim to amici's 6,500 acres will be tried after final determination of the instant case.

Amici are individual family farmers whose tracts claimed by the Tribe average 186 acres in size. Most of their land has been owned by their families for generations, some by patent direct from the U.S. in the 19th century.

Their ancestors settled, cleared, and developed these farms, which the families have continued to improve, cultivate and pay taxes on ever since. Their titles and right to possession were never challenged by the Tribe until the filing of the instant suit. (The United States is not a party against these amici, having brought suit only as to the 2,900 acres in the original reservation.) Through the years these families have bought and sold portions of their farms from and to each other, and have borrowed and made loans on such lands, all in reliance on fully established records of title. Under careful husbandry, progressive farming practices and inflation their fertile land has steadily increased in value until, immediately before the decision of the Circuit Court, their best informed appraisal of its average reasonable market value was \$2,000 per acre. (\$13,000,000 for their combined 6,500 acres.)

The decision of the 8th Circuit Court of Appeals on April 11, 1978 cast a redoubtable cloud on amici's title which has resulted in serious disruption of long existing economic, financial and social relationships affecting not only these amici but the entire agricultural community. Prospective purchasers are now reluctant to buy and lending institutions unwilling to make loans on land which was in great demand prior to April 11. Land values have already declined. Normal commerce is inhibited as the community seeks to assess the impact of a decision which

seems to set long recognized laws of accretion and avulsion topsy-turvy and to hold that no white citizen will be secure in his property if it is claimed by an Indian or Indian tribe.

It is true the judgment of the Circuit Court states its application of § 194 placing the burden of proof on the defendants in the instant litigation is not controlling as to amici's land outside of the Barrett Survey and the original reservation. (App. A66, footnote 69 continued from previous page.) It noted the same proof showing presumptive title to the reservation (2,900 acres) cannot govern any future litigation concerning the lands outside that area. However, the same footnote states "nor do we foreclose the right of the plaintiffs to urge that § 194 is applicable under different proof." These amici must therefore anticipate the Tribe will attempt to use the Circuit Court's application of § 194 against them in the case yet to be tried if the decision is not reversed. This alone gives amici a strong and compelling interest in the granting of a writ of certiorari to review the constitutionality of § 194 as construed and applied by the 8th Circuit.

Amici also have a direct immediate interest in a review of those portions of the decision which ignore or depart from well established principles of the law of accretion and avulsion. E.g. the U. S. Supreme Court as well as circuit courts of appeal and the Supreme Courts of Iowa and Nebraska have uniformly held that to prove an avulsion there must be evidence of identifiable land remaining in place after the avulsion. The 8th Circuit opinion failed to enforce this long established requirement of identifiable land in place, dismissing it with the bare state-

ment: "little significance can be attached to its alleged absence under the evidence adduced in the present case" (App. A42). These amici intend to prove the absence of identifiable land in place and to disprove avulsions thereby as an integral part of their own defense. Approximately one third of their land lies just outside the 2,900 acres in the instant case. It is reasonable to anticipate the evidence of absence of identifiable land in place as to such land will be substantially the same as that introduced in the instant case. Thus it is of crucial importance to these amici that a writ be granted to determine whether the absence of identifiable land in place still negates avulsion as repeatedly held by this Court or whether the 8th Circuit's rejection of the identifiable land in place requirement shall stand as the law of the case.

For the above reasons, the farmers for whom this brief is filed as friends of the court have an immediate and direct interest in the case and have an even larger stake in the granting of a writ of certiorari than do petitioners themselves. Review by the Supreme Court is of crucial importance not only to petitioners and these amici, but to everyone presently claiming land which was ever owned, occupied, hunted or fished by individual Indians or Indian tribes from time immemorial in what is now the United States.

The 8th Circuit's application and interpretation of 25 U. S. C. § 194 imperils long established ownership of private and public held land throughout our country. When land titles and values are threatened by judicial fiat, the judicial action causing such widespread uncertainty and economic loss should be reviewed at the highest level, not left to an intermediate court.

REASONS FOR GRANTING THE WRIT

1. The decision below raises a serious issue as to the constitutionality of 25 USC § 194 which has never been passed upon by this court. Determination of whether the statute is or is not constitutional affects and may prove decisive of the rights of all citizens on both sides of major Indian land claims throughout the United States. It is a question of great national importance which should be settled at the highest judicial level.

The ancient code section resurrected by the 8th Circuit to discriminate against petitioners reads as follows:

“25 U. S. C. § 194. Trial of right of property; burden of proof

‘In all trials about the right of property in which *an Indian* may be a party on one side, and a *white person* on the other, the burden of proof shall rest upon the *white person*, whenever the *Indian* shall make out a presumption of title in himself from the fact of previous possession or ownership.’” Emphasis ours.

This Court has never passed upon the constitutionality of § 194 in the 144 years since it was enacted. Nor did the Circuit Court give any serious consideration to the constitutional question, disposing of it in a single footnote (App. A20) citing one case which is not in point *Morton v. Mancari*, 417 U.S. 535, 554-555 (1974). The opinion assumed § 194 is constitutional and then used it to switch the burden of proof from plaintiffs to defendants. Such interpretation and application of the statute effectively

delivered the case into plaintiffs' hands. It was discrimination proscribed by the Constitution in that it was based solely on race and therefore denied defendants Due Process and Equal Protection of the Laws in violation of the Fifth and Fourteenth Amendments. The decision's application of the statute also places these amici's land in jeopardy. If not reversed it will make their defense much more difficult as set forth in the Statement of Interests of Amici Curiae, supra. However, the impact of the decision below assuming § 194 to be constitutional and using it to foreclose the case against petitioners extends far beyond petitioners in the instant case and these amici in the next. Which ever way the question of constitutionality is resolved, the answer will have a direct impact on all claims for lands already asserted or to be asserted by Indians or Indian tribes anywhere in the U. S. A statute largely unnoticed by this court and lower courts since 1834 is suddenly catapulted into a position of crucial significance in the determination of far flung claims involving vast areas of valuable land from Maine to California. If left standing, the decision below will encourage the proliferation of additional Indian claims and provide widely-applicable precedent stacking the deck against any white person who finds himself the target of such claims.

Amici respectfully submit the petition should be granted to review § 194 and its application which they believe to be unconstitutional in the following respects:

The plain meaning of the words of § 194 can only be to discriminate in favor of an Indian against a white person. No twisting of semantics can give them any other meaning. The section is therefore a denial of equal pro-

tection and due process on its face, and the only question remaining is whether it can somehow be justified. We cannot believe such manifestly discriminatory language met constitutional standards even when it was enacted in 1834, although such may have been arguable under then existing conditions. But absolutely no justification for such invidious racial discrimination has been shown in the instant case or can be shown to uphold the statute today. As stated by Mr. Justice Powell in his opinion announcing the judgment of the Court in the *Bakke* case:

"The clock of our liberties * * * cannot be turned back to 1868 * * *. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Regents of California v. Bakke*, — U. S. —, 98 S. Ct. 2733, p. 2751 (1978).

And further at p. 2757:

"Preferring members of any one group for no reason other than race or ethnic origins is discrimination for its own sake. This the Constitution forbids."

The opinion below makes no pretense of meeting the constitutional requirements enunciated in *Bakke* in the following excerpts from the opinion of Justices Brennan, White, Marshall and Blackmun:

"a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." at p. 2782 and "In sum, because of the significant risk that racial classifications established for ostensibly benign purposes

can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such classification an important and articulated purpose for its use must be shown." at p. 2783.

The 8th Circuit neither subjected § 194 to "strict scrutiny" nor found that "it furthers a compelling government purpose" or "important and articulated purpose". It merely cited language from *Morton v. Mancari* as a basis for *assuming* that the special treatment accorded plaintiffs by § 194 is justifiable in the instant case (App. A20, footnote 18).

It did *not explain* nor is there any way it could explain how such special treatment "can be tied rationally to the fulfillment of" any "unique obligations toward the Indians" which Congress might or might not have in the instant case. There was no showing here, as required in *Mancari* that "the preference is reasonably and directly related to a legitimate, non-racially based goal". There was no finding similar to that in *Mancari* "that the preference was not racial at all" but "an employment criterion reasonably designed to further the cause of Indian self-government." *Morton v. Mancari*, 417 U. S. 535, 554-55 (1974).

It is clear from Mr. Justice Powell's discussion of *Mancari* in *Bakke* at p. 2756, n. 42 that *Mancari* is in no way supportive of § 194.

The 8th Circuits' ill conceived misapplication of *Mancari* to uphold § 194 standing alone would call for review of the section's constitutionality by this Court. A writ of certiorari should also be granted because the decision be-

low departs from numerous other decisions of this Court barring racial discrimination in federal statutes.

Bolling v. Sharp, 347 U. S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).

Weinberger v. Wiesenfeld, 42 U. S. 636, 43 L. Ed. 2nd 514, 95 S. Ct. 1225 (1975).

Washington v. Davis, 426 U. S. 229, 48 L. Ed. 2nd 597, 607, 96 S. Ct. 2040 (1976).

2. The decision below denies petitioners due process by ignoring the well established principle that avulsion cannot occur in the absence of identifiable land in place continuing after the avulsion. Certiorari should be granted to enable the court to reaffirm or reject its requirement of identifiable land in place in previous decisions.

The question to be decided in riparian land litigation is frequently whether accretion or avulsion has taken place. This was certainly true in the instant case where most of the evidence derived from plaintiffs' attempts to prove avulsion and defendants' attempts to negate it.

From at least as early as the eighteenth century, when so stated by Vattel, the doctrine of avulsion has been held not to be applicable in the absence of identifiable land in place continuing after the avulsion.

Emmerick Vattel, *The Law of Nations, Principles of Natural Law applied to the Conduct of Nations and Sovereigns* (publ. 1758), Book 1, Chap. 22, §§ 268-70.

The requirement of identifiable land in place has been upheld in numerous decisions of this court:

Nebraska v. Iowa, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892).

Oklahoma v. Texas, 260 U. S. 606, 637, 67 L. Ed. 428, 435 43 St. 221 (1922).

Louisiana v. Mississippi, 384 U. S. 24, 16 L. Ed. 2nd 330 86 S. Ct. 1250 (1966).

Mississippi v. Arkansas, 415 U. S. 289, 291, 39 L. Ed. 2nd 333, 339 94 S. Ct. 1046 (1974).

Oregon v. Corvallis Sand & Gravel Co., 429 U. S. 363, 375, 50 L. Ed. 2nd 550, 561, 97 S. Ct. 502 (1977).

The Supreme Courts of Iowa and Nebraska have also consistently held there can be no avulsion in the absence of identifiable land in place.

Coulthard v. Stevens, 84 Iowa 241, 50 N. W. 983 (1892).

Kitteridge v. Ritter, 172 Iowa 55, 151 N. W. 1097 (1915).

Wilcox v. Pinney, 250 Iowa 1387, 98 N. W. 2nd 720, 723 (1959).

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Iowa Railroad Land Co. v. Coulthard, 96 Neb. 607, 148 N. W. 328 (1914).

Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647 (1935).

Conkey v. Knudson, 143 Neb. 5, 8 N. W. 2nd 538 (1943).

Courts and litigants throughout the U. S. have relied on the above decisions and similar decisions in other states. Until the decision of the Circuit Court in the instant case, the requirement of identifiable land in place has been widely accepted as a reliable standard giving stability to riparian land titles and claims everywhere. Even the

Tribe conceded the necessity of showing identifiable land in place in the instant case, contending on appeal that the district court had erred in finding the Tribe's evidence did not meet such requirement. The 8th Circuit then surprisingly abandoned the identifiable land in place requirement on its own initiative with no explanation other than the unsupported statement "little significance can be attached to its alleged absence under the evidence adduced in the instant case" (App. A42).

Such cavalier treatment of a well established principle of the law of accretion and avulsion deprived petitioners of their property without due process. These amici and others whose rights rest in part on the absence of identifiable land in place will also be denied due process if this portion of the decision below is permitted to stand as the law of the case. A writ of certiorari should be granted to enable this Court to review whether the absence of identifiable land in place is of "little significance" or is still a fundamental prerequisite of avulsion as previously held by this Court.

—o—

CONCLUSION

For the foregoing reasons, the petitions in this case should be granted.

Respectfully submitted,

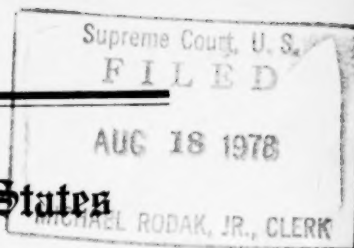
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IN THE
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OCTOBER TERM, 1978



Nos. 78-160, 78-161, 78-162

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE
LAKIN, R.G.P. INCORPORATED, DARRELL L., HAROLD,
HAROLD M. and LUEA SORENSON, HAROLD JACKSON,
OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE
OF IOWA, and STATE CONSERVATION COMMISSION OF
THE STATE OF IOWA,

Petitioners,

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF
THE PETITIONS FOR A WRIT OF CERTIORARI**

JOHN C. CHRISTIE, JR.
CHARLES T. MARTIN
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-160, 78-161, 78-162

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R.G.P. INCORPORATED, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA, and STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,
v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF
THE PETITIONS FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum opinion of the District Court, together with its findings of fact and conclusions of law, is reported at 433 F. Supp. 57, 67 (N.D. Iowa 1977) and the opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

STATUTE INVOLVED

25 U.S.C. § 194 provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether 25 U.S.C. § 194, which places the burden of proof upon a "white person" in litigation over property rights when "an Indian" is a party on one side and a "white person" is on the other, applies when the United States as trustee and an Indian tribe are on one side and various landowners, including natural persons, corporate entities and a state, are on the other.

2. Whether 25 U.S.C. § 194 is unconstitutional on its face because it assigns the burden of proof upon a racial basis in violation of the Fifth Amendment.

INTEREST OF THE AMICUS CURIAE AND REASONS FOR GRANTING THE WRIT¹

There is presently pending in numerous federal courts extensive Indian claims litigation for the recovery of land and for trespass or other damages for the wrongful possession of the land.² These cases seek the return

¹ Attorneys for all of the parties herein have given written consent to the filing of this amicus brief. Copies of the consents have been submitted to the Court with this brief.

² A partial list of cases includes: *United States v. Atlantic Richfield*, No. A-75-215 Civ. (D. Alaska), appeal docketed, No. 77-3972 (9th Cir. Sept. 6, 1977); *United States v. State of Maine*, Civ. No. 1966-ND, 1969-ND (D. Me.); *Western Pequot Tribe of Indians v. Holdridge Enterprises, Inc.*, Civ. No. H-76-193 (D. Conn.);

of vast amounts of real property from present owners and the recovery of billions of dollars in damages upon the basis that past acquisitions of Indian tribal land by the defendants or their predecessors in interest were invalid and of no effect.³ This litigation has been instituted in virtually every instance by either the United States, as trustee, or by the Indian tribes themselves, or both.

The American Land Title Association (ALTA) is the national trade association of the land title industry. Its

Schaghticoke Tribe of Indians v. Kent School Corporation, Civ. Action No. H-75-125 (D. Conn.); *Mashpee Tribe v. New Seabury Corp.*, Civ. No. 76-3190 (D. Mass.), appeal docketed, Nos. 78-1272-73-74 (1st Cir. May 1, 3 and 8, 1978); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, Civ. No. 770772-L (W.D. La.); *Oneida Indian Nation of New York State v. County of Oneida*, 70-CV-35 (N.D.N.Y.); *Oneida Indian Nation of New York v. The New York State Thruway Authority*, 78-CV-104 (N.D.N.Y.); *Seminole Tribe of Indians of Florida v. State of Florida*, No. 78-6116-CIV (S.D. Fla.); *Sappier v. State of Maine*, Civ. No. 78-72-ND (D. Me.). In addition to these and numerous other pending cases, the United States, through the Department of the Interior, has indicated its intention to recommend the institution of a number of additional actions on behalf of Indian tribes. For example, on July 1, 1977 the Department announced its recommendation that the Justice Department on behalf of St. Regis, Mohawk, Cayuga and Oneida Nation Tribes sue those persons claiming an adverse interest in approximately 272,500 acres of land in upper New York State. Department of Interior News Release dated July 1, 1977. On August 30, 1977 the Department similarly recommended litigation on behalf of the Catawba Indian Tribe for approximately 140,000 acres of land in the Rock Hill, North Carolina area. *Washington Post*, August 31, 1977, at p. A6. In fact, in connection with legislation to extend the statute of limitations provided in 28 U.S.C. § 2415 for commencing Indian claims for monetary damages by the United States, as trustee, the Department indicated that the number of potential claims under review "could amount to well over 1,000." S. Rep. No. 95-236, 95th Cong., 1st Sess. 2 (1977).

³ Among the more substantial of the claims for land and damages asserted in the pending cases are *United States v. State of Maine*, *supra*, approximately 12.5 million acres and an estimated \$25 billion in trespass damages; *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, *supra*, 7,000 acres of land and \$100,000,000 in damages; *Oneida Nation v. The New York State Thruway Authority*, *supra*, approximately 6 million acres and damages exceeding \$12 million.

approximately 2,200 members include land title insurers, their agents, abstractors and associate members. The principal function of the land title industry is to facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions.

The statute at issue herein, 25 U.S.C. § 194, purporting to govern the allocation of the burden of proof in Indian claim litigation "about the right of property" has never been applied in any reported case prior to the opinion of the Eighth Circuit herein since the time of its original enactment some one hundred and fifty-six years ago.⁴ The belated resuscitation of this statute is of great concern to the ALTA and to all persons relying upon the marketability of land titles. The Eighth Circuit's sweeping application of Section 194 would suddenly erase in this and other similar cases accepted allocations of the burden of proof in actions affecting the titles to real property which have been developed over the years in courts throughout the country. That development of the law has contributed substantially to stable and predictable land transfers which are a necessary prerequisite to the informed judgment of attorneys, abstractors, title insurers, government agencies at various levels and others who must pass daily upon the state of title to real property.

Inasmuch as the events complained of in Indian land claims litigation occurred in the distant past, in many cases hundreds of years ago, the outcome of the litigation often will rest upon the application of the burden

⁴ The opinion itself notes that two previous cases have cited Section 194 but that "... neither case expounds upon the effect this section should be given." 575 F.2d at 631 n.19. *United States v. Sands*, 94 F.2d 156 (10th Cir. 1938); *Felix v. Patrick*, 36 F. 457 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892).

of proof, as it clearly did herein.⁵ Prompt resolution of the proper construction of Section 194 will provide constructive guidance to those many trial and appellate courts presently confronted with this litigation, thereby expediting its conclusion by avoiding unnecessary appeals and re-trials.

The need for this Court's present review of the Eighth Circuit's opinion is particularly compelling inasmuch as the mere pendency of Indian land claim litigation creates uncertainty over the state of the titles to the land at issue. In certain places in which this litigation is occurring, that uncertainty has caused the sale of homes and other real estate transactions to come to a virtual halt, has made mortgage loans difficult or impossible to obtain and has threatened the tax base and future development of municipalities, all of which has had a substantial economic and emotional impact.⁶ If the Eighth Circuit's erroneous decision is allowed to stand, pending Indian land claim litigation will be prolonged and new claims will be encouraged. As a result, more and more people may be affected by similar economic and emotional problems.

⁵ Of course, the application of the burden of proof is frequently critical in any case, as this Court has observed:

Where the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive to the outcome of the litigation

Lavine v. Milne, 424 U.S. 577, 585 (1976).

⁶ 123 Cong. Rec. S. 16239 (daily ed. October 4, 1977) (remarks of Senator Kennedy); 123 Cong. Rec. S. 5655-57 (daily ed. April 6, 1977) (remarks of Senator Brooke); 123 Cong. Rec. S. 2305-06 (daily ed. March 1, 1977) (remarks of Senator Hathaway); 123 Cong. Rec. S. 3211-12 (daily ed. March 1, 1977) (remarks of Senator Muskie); 123 Cong. Rec. H. 1533-34 (daily ed. March 1, 1977) (remarks of Rep. Cohen).

STATEMENT

This brief is submitted in support of petitions for certiorari from a final judgment remanding this case to the District Court with directions to enter judgment quieting title in the lands in issue in the United States, as trustee, and in the Omaha Indian Tribe. The relevant facts of this case are set forth in the opinions of the Court of Appeals and the District Court and are summarized as follows.

On May 19, 1975, the United States, suing as trustee for the Omaha Indian Tribe, brought suit seeking a judgment quieting title in the United States, as trustee, respecting 2,900 acres of land. On May 20, 1975, the very next day, the Omaha Tribe itself filed suit to restrain named landowners from interfering with its peaceful possession and use of the same 2,900 acres and, subsequently, brought another suit to quiet title.⁷ The defendants were several landowners and tenants, a corporate landowner, a corporate mortgagee, the State of Iowa and the State Conservation Commission. It was undisputed that from at least the 1940's until the time of the litigation the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute.⁸

⁷ The tribal complaint to quiet title (No. 75-4067) in fact encompassed 11,500 acres, including the 2,900 acres which was the subject of the action instituted by the United States on its behalf. (No. 75-4024). In consolidating all of the cases for trial, the District Court severed and stayed all claims to land beyond the 2,900 acres at issue in common. 433 F. Supp. at 69.

⁸ The District Court found the land at issue to be "now a valuable and productive tract of farm ground, as evidenced by the purchase of 2180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at \$1,685,000, approximately 1780 acres of which is within [the 2,900 acres immediately in dispute]." *Id.*

Following a lengthy trial, the District Court reviewed the evidence and, upon extensive findings of fact, entered judgment against the United States, as trustee, and the Omaha Tribe, quieting title in the defendants. 433 F. Supp. at 68-88, 92. The Court determined that the Missouri River had changed by reason of the erosion of the tribal land and accretion to the defendants' riparian land to which it was presently attached. 433 F. Supp. at 68.

The Court of Appeals reversed, finding that Section 194 controlled and that "the defendants have failed to overcome the presumptive right of possession and title in the Tribe" 575 F.2d at 623, 631-33. As a result, the Court held the defendants "failed in sustaining their burden of proof under § 194." 575 F.2d at 651.

SUMMARY OF ARGUMENT

25 U.S.C. § 194 purports to place the burden of proof upon the "white person" in all trials about the right of property in which "an Indian" is a party on one side and "a white person" is on the other, once the Indian establishes a "presumption of title in himself from the fact of previous possession or ownership." The predecessor of this section of federal Indian legislation was first enacted into law in 1822 and enacted in its present form in 1834.⁹ Since that time, the statute has remained with-

⁹ As noted by the Eighth Circuit, 25 U.S.C. § 194 is derived intact from Section 22 of the 1834 Indian Nonintercourse Act, Act of June 30, 1834, 4 Stat. 729, 733. 575 F.2d at 632 n.20. It was based upon a similar provision in the Nonintercourse Act enacted in 1822, Act of May 6, 1822, § 4, 3 Stat. 682-83 which read:

That, in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

out application in any reported case until the instant litigation.

The statute on its face is an anachronism. The scope of this anachronism was erroneously extended by the Eighth Circuit in applying the statute in litigation in which the United States, as trustee, and an Indian tribe are parties to one side and various landowners, including corporations and a state are on the other. Neither the language of Section 194 itself nor of the 1834 Indian Nonintercourse Act, of which it was a part, supports the Eighth Circuit. Its erroneous construction encourages Indian land claim litigation and, by compounding error and uncertainty, impedes the marketability of land titles.

ARGUMENT

I. Section 194 Does Not Apply To Indian Land Claims In Which The United States Or An Indian Tribe Are A Party Or Parties On One Side Or In Which A Corporate Entity Or State Are A Party Or Parties On The Other.

A. By Its Terms, Section 194 Only Applies When "An Indian" Is A Party.

The only party plaintiffs in these consolidated cases are the United States, as trustee, and the Omaha Indian Tribe, each asserting a tribal interest in the property at issue.¹⁰ Section 194 by its terms applies only when "an Indian" is on one side and a "white person" is on the

¹⁰ The District Court found that the United States "derives its interest in this litigation as a Trustee for the Omaha Indian Tribe and their reservation lands reserved to the Tribe pursuant to the Treaty of 1854." 433 F. Supp. at 68.

With respect to the nature of the tribal plaintiff, the District Court found the Omaha Indian Tribe to be "a duly organized body corporate, established pursuant to its Constitution and Bylaws having been approved by the Secretary of the Interior as provided by law." *Id.*

other. Plainly this is not that case because neither the United States, as trustee, nor the Omaha Indian Tribe is "an Indian".

The Eighth Circuit construed the statute as if it were to provide that in "trials about the right of property in which an Indian *or an Indian tribe* may be a party on one side . . . the burden of proof shall rest upon the white person, whenever the Indian *or an Indian tribe* shall make out a presumption of title in himself *or itself* from the fact of previous possession or ownership." However, plainly such an interpretation goes beyond the words actually chosen by Congress in enacting Section 194. As this Court has recently observed in another context, "[l]ogic and precedent dictate that the starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 98 S. Ct. 2370, 2375 (1978).

Moreover, in examining the language of the Indian Nonintercourse Act of 1834, it is apparent that Congress did not consider the phrase "an Indian" interchangeable with the term "Indian tribe". While certain sections, such as Section 22 (the predecessor of Section 194), applied to "an Indian", other sections applied more broadly to an "Indian Nation" or "Indian Tribe". Thus, for example, Section 12 prohibited conveyances from "any Indian nation or tribe of Indians" unless the same shall be made by treaty.¹¹ In fact, when the protection pro-

¹¹ From 1796 until 1834 the Nonintercourse Act prohibited a conveyance of lands from "any Indian, or nation, or tribe of Indians" unless the same be made by treaty. Act of May 19, 1796, § 12, 1 Stat. 472; Act of March 30, 1802, § 12, 2 Stat. 143. In 1834, at the same time Section 22 was changed to its present form, this prohibition was amended to apply more narrowly to such a conveyance from "any Indian nation or tribe of Indians". Act of June 30, 1834, § 12, 4 Stat. 729, 730. At that time, Congress appears to have con-

vided by certain sections of the 1834 Nonintercourse Act was designed to apply *both* to individual Indians and to Indian tribes, Congress so provided. Thus, Section 9 prohibited the driving of livestock upon land belonging to "any Indian or Indian tribe". (emphasis supplied). This Congressional decision to use different terms within the same Act as well as within some of the same sections of that Act clearly suggests a deliberate choice of words. The term "an Indian" clearly meant an individual, distinct from "an Indian tribe".¹²

There is no present need to expand the scope of Section 194 beyond that contemplated by Congress in 1822 and 1834. As the instant case demonstrates, tribal claims to land are undertaken by the federal government or by the tribes themselves or both with significant resources and competent legal talent.

ceived of Section 12 as protecting tribal property rights while Section 22 was concerned with a "right of property" owned by an Indian individually.

¹² Significant differences exist between the rights, privileges and interests of an individual Indian on the one hand and an Indian tribe on the other. For example, although individual Indians had the capacity to sue and be sued even before they became citizens, there was substantial authority for many years that tribes could litigate only where authorized to do so by statute. See FELIX S. COHEN, *FEDERAL INDIAN LAW* (1942 ed.), pp. 162, 283-85 and *Johnson v. Long Island RR. Co.*, 162 N.Y. 462, 56 N.E. 992 (1900). Because of the distinction between individual Indians and their tribes, courts have held that a tribe's authority to sue extends only to claims involving tribal interests and not to the legal or equitable claims of tribal members. See, e.g., *Sioux Tribe of Indians v. United States*, 89 Ct. Cl. 31 (1939). Conversely, groups of individual Indians do not have the same interest in tribal land as the tribe and, thus, cannot assert a tribal claim. See, e.g., *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906 (Ct. Cl. 1963), and see Cohen, *supra*, p. 288.

B. By Its Terms, Section 194 Only Applies When "A White Person" Is A Party.

The defendants having various interests in the 2,900 disputed acres were several natural persons,¹³ two corporations, the State of Iowa and the State Conservation Commission. In applying Section 194, which requires by its terms that "a white person" be on the other side in a property dispute with an Indian, the Eighth Circuit Court of Appeals concluded that "white person", as used in the statute, includes corporate entities, a state and a state agency.¹⁴ This conclusion directly contradicts prior judicial interpretation of the term and the intention of Congress at the time Section 194 was enacted, as well as the clear language of the statute.

This Court has previously interpreted the term "white person" as used in the Indian Nonintercourse Act of 1834 to denote explicitly a "white person" and no others. *United States v. Perryman*, 100 U.S. 235 (1879). The Court there indicated that this was the meaning the term had at the time of its original enactment, and that the term therefore could not be construed to mean no more than "not an Indian". Section 16 of the 1834 Indian Nonintercourse Act provided that whenever a "white person" commits a crime within Indian country and is unable to pay to the Indian the value of any of the property taken, the United States shall make the payment. A Negro was convicted of stealing cattle from an Indian and the Indian instituted an action against the United States for the value of the stolen cattle. In find-

¹³ No record evidence was offered with respect to the racial characteristics of the natural person defendants.

¹⁴ In this regard, the Eighth Circuit simply found that "the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title . . ." 575 F.2d at 633. (emphasis added). The Court reached this conclusion without any discussion of the meaning of the term "white person".

ing the United States to have no liability pursuant to Section 16, this Court stated:

The term "white person", in the Revised Statutes, must be given the same meaning it had in the original act of 1834. Congress had nowhere manifested an intention of using it in a different sense.

100 U.S. at 236.

There is no reason for this Court to construe the term "white person" as found in Section 22 of the 1834 Non-intercourse Act to have a different meaning than the same term as used in Section 16 of the same Act. Moreover, in 1822 when the predecessor of Section 194 was first enacted and for many years thereafter the term "person" had not been construed to include a corporation for purposes of constitutional and statutory analysis. *Monell v. Department of Social Services of the City of New York*, 98 S. Ct. 2018 (1978).¹⁵ It is also apparent that in 1822 and 1834, Congress would not have contemplated a trial about a right of property by an Indian against a state inasmuch as the doctrine of sovereign immunity shielded the states from such suits. *Hans v. Louisiana*, 134 U.S. 1 (1890).

An examination of other sections of the 1834 Non-intercourse Act indicates that when Congress determined to extend the scope of various provisions of the Act beyond "a white person", it did so in more expansive language. Section 4 provided that "any person other than an Indian" who attempted to reside in Indian country as a trader without license would suffer a penalty and forfeit goods. Sections 7 and 8 imposed a forfeiture of certain monies upon "any person other than an Indian" for trading a gun, trap or other article commonly used

¹⁵ Although at a later date "person" was construed to include a corporation, it is plain that the term "white person" cannot be similarly construed.

in hunting or hunting in Indian country. Section 9 prohibited "any person" from driving cattle upon land "belonging to an Indian or Indian tribe".

These provisions again indicate deliberate Congressional attention to the language utilized and rebut any argument that "white person" should be construed to mean "any person other than an Indian". There is no basis to expand "white person" to mean all "non-Indians", including a state and corporate entities.

II. Section 194 Is Unconstitutional On Its Face Because It Assigns The Burden Of Proof Upon A Racial Basis.

The terms of Section 194 make it unnecessary for this Court to reach any Constitutional decision in this case. As discussed above, the statute applies only when "an Indian" is on one side and a "white person" is on another. This is not that case because here the United States and an Indian tribe are on one side and various natural persons, whose race is not of record, corporations and a state are on the other side.

However, the very language of Section 194 should have caused the Eighth Circuit to subject the statute to rigorous Constitutional analysis. Such an analysis would have led to the necessary conclusion that the automatic assignment of the burden of proof upon a racial basis in Indian land claim cases violates the Fifth Amendment to the Federal Constitution.

It has long been the view of the Court that "racial and ethnic classifications . . . are subject to stringent examination . . . are inherently suspect and thus call for the most exacting judicial examination." *Regents of the University of California v. Bakke*, 98 S. Ct. 2733, 2749 (1978) (Powell, J.). In addition, "strict judicial scrutiny" must be applied when a statute "impinges upon a fundamental right explicitly or implicitly protected by

the Constitution." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Both because the subject statute contains an explicit racial classification and because it directly affects the right to equal protection and due process in civil litigation, the strict scrutiny test should have been applied by the Eighth Circuit. See *Shelly v. Kraemer*, 334 U.S. 1, 22 (1948).

When an individual is classified on the basis of racial or ethnic background and that classification has an effect on a personal right, the individual "is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke*, *supra*, at 2753. At the time of its initial adoption in 1822, Section 194 was an apparent response to the individual Indian's inability to effectively make use of the judicial system to protect his right to property. Today, it cannot be seriously argued that the specific deprivation of rights that Section 194 sought to remedy still exists, notwithstanding other deprivations of rights that Indians may currently suffer and which may justify different remedial action.

Since the adoption of Section 194 fundamental changes have occurred with respect to the Indian's legal status as well as with respect to his ability to participate in the litigation process. See pp. 9-10, *supra*; *McClanahan v. State Tax Commissioner of Arizona*, 411 U.S. 164, 172-73 (1973). Moreover, Section 194 has been rendered moot and superfluous by subsequent legislation directed towards similar deprivations but premised upon a universal basis and not limited to any particular group. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (1970),¹⁶ was a watershed in protecting the rights of all

¹⁶ Title 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the

persons engaged in the litigation process and land transactions. The Civil Rights Act goes beyond Section 194 in its extension of these rights not just to racial or ethnic minorities but to "all persons" including white persons." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976).

Rather than undertake an analysis of whether Section 194 is a presently valid method of securing a compelling governmental interest, the court placed simplistic reliance upon this Court's statement in *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974) that Indians may be "single(d) out . . . for particular and special treatment." However, in *Mancari*, the Court specifically pointed out that the legal status of the Bureau of Indian Affairs was *sui generis* and that the preference granted to Indians was a function of the political nature of the Bureau and the quasi-sovereign status of the Indian tribes. *Id.* at 554; *Bakke*, *supra*, at 2756 n.42. Those cases where the Court recognized that a special status is present with regard to certain aspects of Indian self-rule and quasi-sovereignty do not apply in the equal protection area.¹⁷ *Mancari* provides no shortcut to the rigorous

full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title 42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

¹⁷ Any claim by the plaintiffs herein that Indians have a special status in the equal protection area appears to contradict language in Justice Powell's opinion in *Bakke*, where he says:

It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.

98 S. Ct. at 2751.

equal protection analysis that Section 194 demands and the Eighth Circuit erred by avoiding such an analysis.

In addition to the fact that Section 194 does not serve a compelling governmental interest in protecting Indian rights, it also places an impermissible burden on "white persons" who find themselves engaged in litigation with an Indian. The automatic assignment of the burden of proof on a purely racial basis impinges on the fundamental right to due process guaranteed by the Constitution and should have been subjected to strict scrutiny on that basis as well as by the court below.

This Court has repeatedly held that the right to engage in the litigation process is a fundamental right. In *Chambers v. Baltimore and Ohio R. Co.*, 207 U.S. 142, 148 (1907) the Court stated:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

In a more recent opinion, the Court emphasized that "the right to a meaningful opportunity to be heard . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971).

The presumption contained in Section 194 is not consistent with recent decisions of this Court. In *Reed v. Reed*, 404 U.S. 71 (1971), the Court struck down a provision of the Idaho probate code that gave preference to men over women for appointment as administrators of decedents' estates upon a determination that gender may not be used as a burden-shifting device in the distribution of economic benefits. See also, *Craig v. Boren*, 429 U.S. 190 (1976). Here the characteristic of race is an equally

unacceptable means of allocating burdens that are essential in securing economic benefits. Failure of the court below to examine the presumptions inherent in Section 194 is yet another ground for reversing the Eighth Circuit.¹⁸

Finally, it should also be emphasized that this is not a situation where the affected party has another outlet to exercise his due process right. The opportunity to defend the land claim is singular, cf. *Grant Timber & Manufacturing Co. v. Gray*, 236 U.S. 133 (1915), and exists only within the venue of the court. The fact that this due process right cannot be exercised elsewhere should have been considered by the Eighth Circuit before it allowed this right to be so heavily encumbered. *Boddie*, supra, at 375-76; cf. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

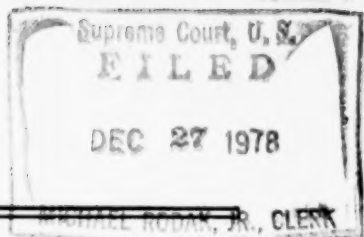
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Dated: August 18, 1978

¹⁸ Section 194 should also fail on the basis that it is simply not rational to allocate the burden of proof on "white persons." See *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639 (1929).

APPENDIX



In The
Supreme Court of the United States
October Term, 1978

No. 78-160

ROY TIBBALS WILSON, et al.,
Petitioners,
vs.
OMAHA INDIAN TRIBE, et al.,
Respondents.

No. 78-161

IOWA, et al.,
Petitioners,
vs.
OMAHA INDIAN TRIBE, et al.,
Respondents.

**ON WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

**PETITIONS FOR WRITS OF CERTIORARI FILED
JULY 28, 1978**

CERTIORARI GRANTED NOVEMBER 13, 1978

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UNITED STATES DISTRICT COURT

DOCKET ENTRIES

C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILSON, Roy Tibbals; LAKIN, Charles G.; LAKIN, Florence; R. G. P. INCORPORATED, an Iowa Corporation; JACKSON, Harold; PETERSON, Otis; TRAVELERS INSURANCE COMPANY and THE STATE OF IOWA,

Defendants.

CAUSE

Complaint to quiet title and for Injunctive relief.

ATTORNEYS

For Plaintiffs—

Evan L. Hultman
Robert L. Sikma

For Defendants—

Roy Tibbals Wilson,
R. G. P. Incorporated,
Harold Jackson and
Otis Peterson

Edson Smith

3535 Harney Street
Omaha Nebraska 68131

Thomas R. Burke

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First National Center
Omaha, Nebraska 68102

Jack W. Peters
501-511 Park Bldg.
Council Bluffs, Iowa 51501

Peter J. Peters
233 Pearl Street
Council Bluffs, Iowa 51501

For Defendants—
Lakin

Philip J. Willson
301 Park Bldg.
Council Bluffs, Iowa 51501

12-8-75 State of Iowa
Attorney General
Bennett Cullison, Jr. State Capitol
Harlan, Ia. 51537 Des Moines 50319

Monona County Attorney
Stephen W. Allen
Onawa 51040

Alan Loftis
Box No. 315
Seward, Nebraska 68434

Travelers Ins. Co.

(Jan. 1976)

Statistical Cards: Card JS-5 mailed 5-19-75 and Card
JS-6 mailed 5-20-77.

I, the undersigned Clerk of the United States District
Court for the Northern District of Iowa, do certify that
the foregoing is a true copy of an original document re-
maining on file and record in my office.

WITNESS my hand and seal of said Court this 16
day of November, 1978.

K. W. Fuelling, Clerk

(SEAL)

By: /s/ D. Henry, Deputy

Date	Nr.	Proceedings
1975		
5-19	1	Complaint To Quiet Title and For Injunctive Relief.
	2	Motion For Preliminary Injunction.
	3	Brief In Support of Motion For Preliminary Injunction.
5-22	4	Resistance To Plaintiff's Motion For Preliminary Injunction and
	5	Motion For Preliminary Injunction and
	6	Brief in Support of Resistance and Motion by Defendants Roy Tibbals Wilson, R. G. P. Incorporated, Harold Jackson and Otis Peterson.
5-22	7	Order setting hearing on Motions for 5-28-75 at 2:30 P. M.
5-28	8	Supplement to memorandum of Defts. Wilson et al in support of their resistance to pltf.'s motion for preliminary injunction.
5-28	9	Pltf.'s supplementary memorandum in support of motion for prel. injunction.
5-28	10	Official s/h notes of conference (separate file) (transcript rec'd. on)
5-30	11	Affidavits of U. S. (Cline, Robinson, Swanson, Corke & Veeder).
6- 2	12	Summons, w/Marshal's returns. (Fees: \$45.72)
6- 3	13	Affidavits of U. S. (Cline, Robinson, Swanson, Corke).
6- 3	14	Omaha Tribe's application to dismiss or hold in abeyance.
6- 3	15	Supplemental memorandum of Defts. Wilson, et al.

- 6- 3 16 State of Iowa's memorandum brief in support of special appearance.
- 6- 5 17 Order denying Defts. application for preliminary injunction & granting Pltfs. applications; all Defts. enjoined & restrained from interfering with use & occupancy of lands, and from prosecuting Monona District Court Action until final judgment entered herein; Pltfs. to deposit with Clerk net profits received from crops together with report of receipts & disbursements. (OB 18-200).
- 6- 9 18 Separate answer & counterclaim of deft. Jackson.
- 6-10 19 Answer of defts. Tibbals Wilson, Lakins.
- 6-16 20 Pltf.'s Response to Omaha Tribe's application to dismiss or hold in abeyance.
- 6-16 21 Separate answer & counterclaim of deft. Peterson.
- 6-18 22 Answer and Counterclaim of Deft. RGP.
- 6-18 23 Answer of Deft. State of Iowa.
- 7- 1 24 Order denying Motion of Omaha Tribe filed on 6-3-75 for dismissal. (OB 19-11).
- 7- 2 25 Defts. Wilson & Jackson application for order directing reimbursement of winter wheat crop expenses, w/affidavit.
- 7- 2 26 Motion by Defendant State of Iowa For Relief From Temporary Injunction.
- 27 Brief of Defendant State of Iowa in Support of Motion.
- 7-16 28 Resistance by Tribe & USA to application for order directing reimbursement of winter wheat crop expenses.
- 7-16 29 Pltf.'s Response to State of Iowa's Motion for relief from preliminary injunction.

- 7-19 30 Application For Order Directing Reimbursement of Winter Wheat Crop Ex.
- 7-21 31 Order that Defts. Wilson, Jackson, RPG., Inc. & Peterson shall be reimbursed by Tribe for expenses incurred in planting. (OB 19-23).
- 8-12 32 Pltf.'s Reply to counterclaim of Deft. Jackson.
- 33 Pltf.'s Reply to counterclaim of Defts. Wilson & Lakins.
- 34 Pltf.'s Reply to counterclaim of Deft. Peterson.
- 35 Pltf.'s Reply to counterclaim of Deft. RGP, INC.
- 9- 2 36 Tribe's Application to Court for Relief.
- 9- 3 37 Tribe's Report & accounting to the Court.
- 9- 5 38 Defts. Wilson & Jackson resistance to application to the court for relief.
- 9-18 39 Application for Payment of winter wheat crop expenses by RGP, INC. & OTIS PETERSON.
- 9-26 41 Memorandum In Support Of Omaha Tribe's Application For Relief.
- 9-24 40 RGP, Inc. & Otis Peterson application for change of possession of land for farming purposes.
- 9-29 42 Omaha Tribe brief to the court concerning question of jurisdiction.
- 10- 3 43 Defts. Wilson & Jackson application for possession for farming purposes for 1976 crop year. (separate file)
- 10- 6 44 Answer To "Application For Change Of Possession Of Land For Farming Purposes" and Motion For Trial On The Merits.
- 10- 7 45 Order—motion for relief from temporary injunction denied; plaintiffs' motion for equitable relief denied.

- 10- 7 46 Memorandum in Support of Defts. Wilson & Jackson's Application for Possession & Request for Oral Argument.
- 10- 8 47 Motion For Trial on the Merits; For Damages; and Answer to "Application For Possession For Farming Purposes For The 1976 Crop Year".
- 10-16 48 Order On Pending Motions.
- 10-17 49 Defts. Wilson & Jackson application for permission to harvest corn crop.
- 50 Affidavit of Raymond L. Huber (separate file).
- 10-29 51 Tribe's resistance to application to harvest corn.
- 10-31 52 Omaha Tribe's Compliance With Court's Order Concerning Wheat.
- 11- 6 53 Supplemental Compliance With Court's Order Concerning Wheat.
- 11- 6 54 Response of U. S. to Court's Order of 10-16-75.
- 11-12 55 Response of Wilson & Jackson to Court's Order of 10-16-75.
- 11-21 56 Application To Require Plaintiffs To Mark Court-Imposed Boundary and For Further Relief.
- 12- 8 57 Notice of appearance of Bennett Cullison for Deft. State of Iowa.
- 12-15 58 Order on Motions: Ruling for payment of winter wheat crop expenses reserved; permission to harvest corn crop denied as moot; motion to require pltf's. to mark court-imposed boundary granted, and U. S. directed to commence a survey for purpose of marking said boundary; final pre-trial conference set for 2-10-76 at 9:00 A. M., Sioux City. (OB19-108).

- 12-17 59 Order setting final pre-trial conference on 2-10-76 at 9 A. M.
 - 12-22 60 Motion To Dismiss by Defendant State of Iowa.
 - 12-24 61 Motion For Continuance. (Final Pretrial Conference.)
 - 12-31 62 Omaha Indian Tribe's Motion To Consolidate, Motion For Separate Trial and Response To Motion Of Harold Jackson.
 - 1976
 - 1- 5 63 Deft. State of Iowa's Application to modify temporary injunction. (Oral argument requested.)
 - 1- 5 64 Request To Withdraw Motion To Dismiss. (State of Iowa Filed 12-22-76).
 - 65 Motion For Continuance. (State of Iowa).
 - 1-13 66 Defts. State of Ia. & Cons. Comm. Resistance to motion to consolidate (Oral argument requested).
 - 1-14 67 Defts. Wilson & Lakin Request for production of documents, etc., under Rule 34.
 - 68 Defts. Wilson & Lakin Interrogatories to Pltf.
 - 1-21 69 Motion To Have Made Permanent The 1867 Barrett Meander Survey Line Based Upon Completed and Accurate Dependent Resurvey and Monumentation of That Line in Keeping with This Court's Order of December 15, 1975.
 - 1-22 70 Government's Request for Extension of Time to survey area as per Order of 12-15-75.
 - 1-26 71 Order on Motions: Cases No. C75-4024 and 4026 and C 75-4067 are consolidated; final pretrial conference continued until further order of court; Deft. State of Iowa's Motion to withdraw motion to dismiss granted. (OB 19-128)
-

UNITED STATES DISTRICT COURT
DOCKET ENTRIES

C 75-4026

January 26, 1976

OMAHA INDIAN TRIBE, organized Indian Tribe pursuant to Act of June 18, 1934 (48 Stat. 984) as amended,

Plaintiffs,

vs.

JACKSON, Harold; PETERSON, Otis; DISTRICT COURT IN AND FOR MONONA COUNTY, IOWA,

*intervening defts. added 8-25-75

Roy Tibbals Wilson and Charles Lakin,

Defendants.

CAUSE

Complaint for Injunction, for stay of State Court proceedings and Other Relief.

ATTORNEYS

For Plaintiff—

John T. O'Brien
916 Grandview Boulevard
Sioux City, Iowa 51101

William H. Veeder
4808 West Braddock Rd.
Alexandria, Va. 22311

*Defts. Wilson & Lakin
added 8-26-75:

Edson Smith
3535 Harney Street
Omaha 68131

plus Tom Burke &
Jack Peters as attorneys.

For Defendant—Jackson.

*Thomas R. Burke
Suite 1900
One First National Center
Omaha 68102

*Jack W. Peters
501-11 Park Bldg.
Council Bluffs 51501

Monona Co. District Court
Stephen W. Allen
718 Iowa Avenue
Onawa 51040

Peterson

Peter J. Peters
233 Pearl Street
Council Bluffs 51501

Statistical Cards: Card JS-5 mailed 5-20-75 and Card JS-6 mailed 5-20-77.

I, the undersigned Clerk of the United States District Court for the Northern District of Iowa, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

WITNESS my hand and seal of said Court this 16 day of November, 1978.

K. W. Fuelling, Clerk

(SEAL)

By: /s/ D. Henry, Deputy

Date Nr. Proceedings
1975

- | | | |
|------|---|---|
| 5-20 | 1 | Complaint For Injunction, For a Stay of State Court Proceedings and Other Relief. |
| | 2 | Brief In Support Of The Position Of The Omaha Tribe of Nebraska. (Summons Issued and Delivered to Marshal.) |
| 5-22 | 3 | Order setting time for hearing on motions on 5-28-75 at 2:30 p. m. |
| 5-28 | 4 | Defts. resistance to application for preliminary injunction. |
| 5-28 | 5 | Defts. Jackson & Peterson motion for preliminary injunction. |
| 5-28 | 6 | Memorandum of Defts. in support. |
| 5-28 | 7 | Summons, w/Marshal's services on 5-21 & 5-23-75. (Fees: \$45.48). |
| 5-28 | 8 | Official s/h notes of conference. (separate file) (transcript rec'd.) |
| 6- 3 | 9 | Deft. District Court of Iowa Resistance to application for stay of State Court Proceedings. |

- 6- 3 10 Memorandum of points and authorities in support of title, possession & occupancy of U. S., Trustee for Omaha Indian Tribe.
- 6- 5 11 Order denying Defts. applications for preliminary injunction & granting Pltfs. applications; all Defts. enjoined & restrained from interfering with use & occupancy of lands, and from prosecuting Monona District Court action until final judgment entered herein; Pltf.s to deposit with Clerk net profits received from crops together with report of receipts & disbursements. (OB 18-200).
- 6- 9 12 Separate Answer & Counterclaim of Deft. Jackson.
- 6-16 13 Separate Answer & Counterclaim of Deft. Peterson.
- 7- 2 14 Deft. Wilson & Jackson's application for order directing reimbursement of winter wheat crop expenses, w/affidavit attached.
- 7- 3 15 Motion of Roy Wilson & Chas. Lakin to intervene as Defts., w/copy of proposed Answer attached.
- 7- 3 16 Memorandum of intervening Defts. in support of motion.
- 7-16 17 Resistance by Tribe & USA to application for order directing reimbursement of winter wheat crop expenses.
- 7-19 18 Defts. RGP INC. & OTIS PETERSON application for order directing reimbursement of winter wheat crop expenses.
- 7-21 19 Order that Defts. Wilson, Jackson, RGP, Inc. & Peterson be reimbursed by Tribe for expenses in planting. (OB 19-23).
- 8-25 20 Order granting Wilson & Lakin's Motion to intervene.
- 8-26 21 Answer of intervening Defts. Wilson & Lakin.

- 9- 2 22 Tribe's Application to Court for Relief.
- 9- 3 23 Tribe's Report & accounting to the Court.
- 9- 5 24 Defts. Wilson & Jackson Resistance to application to court for relief.
- 9-18 25 Application of RGP, INC. & Otis Peterson for payment of winter wheat crop expenses.
- 9-24 26 RGP, INC. & Otis Peterson application for change of possession of land for farming purposes.
- 9-29 27 Omaha Tribe Brief to the Court concerning question of jurisdiction.
- 10- 3 28 Application for possession for farming purposes for 1976 crop year. (See No. 43 in Case C 75—4024.)
- 10- 7 29 Order—motion for relief from temporary injunction denied; plttfs' motion for equitable relief denied.
- 10- 7 30 Memorandum in Support of Defts. Wilson & Jackson's Application for Possession and Request for Oral Argument.
- 10- 8 31 Motion For Trial on the Merits; For Damages; and Answer to "Application For Possession For Farming Purposes For The 1976 Crop Year."
- 10-16 32 Order On Pending Motions.
- 10-17 33 Defts. Application for permission to harvest corn crop.
- 34 Affidavit of Raymond L. Huber.
- 10-29 35 Tribe's resistance to application to harvest corn.
- 10-31 36 Omaha Tribe's Compliance With Court's Order Concerning Wheat.
- 11-06 37 Supplemental Compliance With Court's Order Concerning Wheat.
- 11-06 38 Response of U. S. to Court's Order of 10-16-75.

- 11-12 39 Response of Wilson & Jackson to Court's Order of 10-16-75.
- 11-21 40 Application To Require Plaintiffs To Mark Court-Imposed Boundary and For Further Relief.
- 12-15 41 Order on Motions: Ruling for payment of winter wheat crop expenses reserved; permission to harvest corn crop denied as moot; motion to require Pltfs. to mark court-imposed boundary granted, and U. S. directed to commence a survey for purpose of marking said boundary; final pre-trial conference set for 2-10-76 at 9:00 A. M., Sioux City. (OB 19-108).
- 12-17 42 Order setting final pretrial conference on 2-10-76 at 9:00 A.M.
- 12-24 43 Motion For Continuance. (Final Pretrial Conference.)
- 12-31 44 Omaha Indian Tribe's Motion To Consolidate, Motion For Separate Trial and Response To Motion Of Harold Jackson.
- 1976
- 1-14 45 Defts. Wilson & Lakin Request for production of documents, etc. under Rule 34.
- 46 Defts. Wilson & Lakin interrogatories addressed to Pltf.
- 1-21 47 Motion To Have Made Permanent the 1867 Barrett Meander Line Survey Based Upon Completed and Accurate Dependent Resurvey a Monumentation of that Line in Keeping with This Court's Order of December 15, 1975.
- 1-26 48 Order on Motions: Cases No. C75-4024 and 4026 and C75-4067 are consolidated; final pretrial conference continued until further order of court; Deft. State of Iowa's Motion to withdraw motion to dismiss granted. (OB 19-128).

UNITED STATES DISTRICT COURT
DOCKET ENTRIES

January 26, 1976

C 75-4067

OMAHA Indian Tribe, Treaty of 1854 with the U. S. (10 Stat. 1043), Organized pursuant to the Act of 6/18/34 (48 Stat. 984; 25 USC 476) as amended,

Plaintiffs,

vs.

TRACT I—BLACKBIRD BEND AREA, etc.; TRACT II—MONONA BEND AREA, etc.; and TRACT III—OMAHA MISSION BEND AREA,

Defendants.

CAUSE

(Private) U. S. C. 28-1331 Action to quiet title.

ATTORNEYS

For Plaintiff:

John T. O'Brien
916 Grandview Blvd.
Sioux City, Iowa 51101

William H. Veeder
4808 West Braddock Rd.
Alexandria, Va. 22311

For Defendant:

Lloyd Fletcher

Ronald E. Runge
436 Davidson Bldg.
Sioux City, IA 51101

For Defendants:

Darrell L., Harold, Harold
M. & Luea Sorenson

Maurice B. Nieland
300 Toy Bank Bldg.
Sioux City, IA 51101

For Defendants:

Hazel Jacobson, Fred Sanders, Maurice Benjamin, Rosalie Sanders, Richard & Jean & George Ruth, Ross Willey, Willaday Farms, W. W. & Arie Virtue, Vincent Willey, Arthur Orr, John Lund, Lloyd Fletcher, Cleo Cox, Herbert Nelson, Benjamin, Amena Ruth, Ruth Lund, Robert Orr

Wiley Mayne

300 Commerce Bldg.
Sioux City

(Honorable Andrew W. Bogue, U. S. District Judge
R. 318 Fed. Bldg. & U. S. Courthouse
515 - 9th St., Rapid City, So. Dak. 57701)

(see attached sheet.)

I, the undersigned Clerk of the United States District Court for the Northern District of Iowa, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

WITNESS my hand and seal of said Court this 16 day of November, 1978.

K. W. Fuelling, Clerk

(SEAL) By: /s/ D. Henry, Deputy
1975

- 10-06 1 Complaint to Quiet Title for Immediate Access, for Permanent Injunction Order for Quiet Possession, and for Damages (Summons to Marshal for Service.)
- 10-22 2 Appearance of Ronald E. Runge for Lloyd Fletcher.
- 10-23 3 Pltf.'s Application to the Court for Relief.
- 10-28 4 Stipulation For Extension of Time To Move or Plead.
- 10-29 5 Order approving stipulation & enlarging time to plead.
- 10-31 6 Motion To Enlarge Time To Move or Answer. (Defendants Darrell, Harold, Harold M. and Luea Sorenson.)
- 11-10 7 Motion For More Definite Statement (Defendant Northern Natural Gas Co.)
- 8 Brief in Support of Motion For More Definite Statement.
- 11-11 9 Order granting Defts. Sorensons until 12-3-75 to move or plead.

- 11-12 10 Stipulation or Time For Defendant Mid-American Pipeline Company To Move or Plead.
- 11-13 11 Motion of Deft. Harold Jackson for Order of dismissal. (Memo. attached).
- 11-13 12 Order granting Deft., Mid-American Pipeline, until 12-1-75 to move or plead.
- 11-21 13 Application For Enlargement of Time To Move or Plead.
- 11-24 14 Stipulation For Extension For Defendant James Brooks Benson To File Answer.
- 11-25 15 Appearance (pro se) for Defendant Ernest L. Olson.
- 16 Answer (pro se) by Defendant Ernest L. Olson.
- 17 Objection To Application For Enlargement of Time.
- 11-26 18 Order On Motions For Extension of Time to Move or Plead (12-10-75).
- 12- 1 19 Stipulation that Deft. AT&T be granted extension until 12-10-75 to answer.
- 12- 1 20 Motion of Roy Tibbals Wilson, Deft.
- 21 Memorandum in Support of Motion of Deft.
- 22 Stipulation For Extension of Time to Move or Plead.
- 23 Stipulation For Extension of Time To Move or Plead.
- 12- 3 24 Order granting Defts. AT&T; Jacobson, Cox, Fletcher, Peterson, Craford & Bentley until 12-10-75 to move or plead. Deft. Mid-America given until 12-15-75.
- 12- 3 25 Defts. Sorenson's Motion for more definite statement.

- 26 Reasons and authorities in support of motion.
- 12- 4 27 Deft. Benson Motion for extension of time to file answer.
- 12- 8 28 Motion Of Defendants RGP and Otis Peterson.
- 29 Stipulation For Extension of Time To Move or Plead.
- 12- 8 30 Deft. Iowa Public Service for More definite statement, w/Brief attached.
- 12-10 31 Order granting Deft. Benson until 12-15-75 to move or plead.
- 32 Answer of Deft. Travelers Insurance Companies.
- 33 Order granting Defts. State of Iowa & State of Iowa Conservation Commission until 12-15-75 to move or plead.
- 34 Application for enlargement of time (for defts. represented by W. Mayne).
- 12-15 35 Motion For Ingress And Egress In and To Blackbird Bend Tract. (Barrett Survey).
- 12-17 36 Motion of Deft. Fletcher for order to plaintiff to file a more specific statement.
- 12-22 37 Stipulation Enlarging Time. (Def. State of Iowa).
- 38 Motion To Dismiss by State of Iowa and Iowa State Conservation Commission.
- 12-30 39 Motion For Enlargement of Time To Move or Plead.
- 40 Application For Approval Of Costs.

- 41 Statement of Reasons And Authorities In Support Of Application or Approval Of Costs.
- 12-31 42 Defts. Wilson & Jackson Resistance to Motion for ingress & egress.
- 43 Response To Plaintiff's Motion For Ingress and Egress by Defendants Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson.
- 44 Omaha Indian Tribe's Motion To Consolidate, Motion For Separate Trial and Response To Motion Of Harold Jackson.
- 1976
- 1- 5 45 Request To Withdraw Motion To Dismiss. (State of Iowa filed 12-2).
- 46 Answer of Defendants State of Iowa and Iowa Conservation Commission.
- 1-12 47 Defts. Jacobson, Sanders et al. Statement in opposition to motion to consolidate for trial & in opposition for separate trial.
- 1-13 48 Defts. State of Ia. & Cons. Comm. Resistance to motion to consolidate (Oral Argument requested).
- 1-15 49 Answer of Deft. Regina Marie Torticilli.
- 50 Deft. Torticilli Interrogatories to Pltff.
- 51 Application For Enlargement of Time to Move Or Plead.
- 52 Amendment To Statement In Opposition To Motion To Consolidate.
- 1-21 53 Motion To Have Made Permanent The 1867 Barrett Meander Line Survey Based Upon Complete and Accurate Defendant Resurvey and Monumentation of That Line in Keeping With This Court's Order of Decembe. 15, 1975.

- 1-23 54 Pltf.'s Motion to add defendants.
- 1-26 55 Order on motions: Pltf.'s unresisted motion for equitable relief filed 10-23-75 - *denied*; resisted motions to dismiss filed by Deft. Jackson on 11-13-75, Deft. Wilson on 12-1-75, & by Defts. RGP & Peterson on 12-8-75 - *denied*; unresisted motion to dismiss filed by Defts. State of Iowa & Conservation Commission & unresisted motion filed 1-5-76 to withdraw motion to dismiss—*granted*; motions to make more definite & certain filed by Deft. Northern Gas on 11-10-75, by Deft. Sorensons on 12-3-75, by Deft. IPS on 12-8-75, by Deft. Fletcher on 12-17-75—*denied*; Case consolidated with No. C75-4024 & 4026; Ruling on motion for ingress & egress *reserved*; Motion for approval of costs *granted* as to cost of preparing an abstract & its continuance & ruling reserved on remainder of motion; Defts. Benjamin et al given until 1-30-76 to move or plead. (OB 19-129).
- 4- 5 56 Order on various motions: including Item No. 7 severing Case No. 4067 from consolidated cases with respect to issues of damages and all issues concerning lands not within subject res. of Cases No. 75-4024 & 4026. (OB 19-161).
- 4- 7 57 Stipulation that Deft. Agricultural has until 4-24-76 to move or plead.
- 4- 9 58 Defts. Wilson & Jackson resistance to reapplication for access.
- 59 Brief in support of resistance.
- 4-14 60 Pltf. & Defts. Stipulation to plead by 4-23-76.
- 4-16 61 Order granting Defts. until 4-23-76 to move or plead.

- 4-23 62 Answer, Counterclaim and Jury Demand by Defts. (Mayne).
- 63 Motion for judgment on the pleadings of Deft. Agricultural, etc.
- 64 Affidavit of F. John Roost in support of motion for summary judgment of Deft. Agricultural.
- 65 Brief in support of motion for judgment on the pleadings & motion for summary judgment.
- 5- 6 66 First Set of Interrogatories to Pltfs. by Deft. Travelers Ins.
- 5- 7 67 Tribe's Reply to counterclaim and response to demand for jury trial.
- 68 Tribe's Motion to Amend. (add defendants).
- 5-18 69 Defts. (Mayne) resistance to motion to deny (response) demand for jury trial.
- 5-27 70 Tribe's resistance & response to Motion for judgment on pleadings & motion for summary judgment.
- 6- 3 71 Pltf.'s Motion to dismiss as to certain named defendants: (Disclaimers filed by: Hazel Jacobson; Elmer Swan; Emily Blair and Frances Goodman).
- 6- 4 72 Pltfs. (Tribe) Answer to first set of interrogatories of Deft. Travelers Insurance Company.
- 6- 7 73 Reply Brief of Agricultural etc. to "Resistance & Response of Tribe to Motion for judgment on pleadings & motion for summary judgment".
- 6-11 74 Notice of Appearance as Counsel of Record for Omaha Indian Tribe of William H. Veeder, Alexandria, Virginia.

- 6-23 75 Response To "Reply Brief" of Agricultural & Industrial Investment Company Dated June 7, 1976.
- 7-15 76 Answer & Counter-claim of Defts. RGP, Inc. & Otis Peterson.
- 7-19 77 Order granting Motion of Pltf. Tribe filed 5-7-76 to add certain parties as Defendants. Counsel for Tribe directed to notify these Defts. of conference scheduled on 8-6-76. (OB 20-13).
- 8- 6 78 Deft. Travelers Insurance Co.'s Motion for summary judgment on the issue of damages.
- 79 Travelers Brief statement in support of its motion.
- 80 Stipulation by Omaha Tribe & Deft. Monona County that Deft. may have until 9-2-76 to move or plead.
- 8-20 81 Answer, Counterclaim and Jury Demand of Mobil Pipe Line Company.
- 9- 2 82 Motion for leave to file amendment to Answer of Defts. State of Iowa & Iowa Conservation Commission. (copy attached).
- 83 Answer and counterclaim of Deft. Monona County.
- 9- 3 84 Answer of Jim McGuire, Referee.
- 9- 9 85 Answer, Counterclaim & Jury Demand of Defts. Weidner, Burns, Loraditch, Brennan, Nelson, Hickmans, Fender, Queens & Clark.
- 86 Motion for leave to file amendment to Answer of Defts. Boulden & Stokley (copy attached).
- 87 Tribe's Opposition to Motion for Summary Judgment by the Travelers Insurance Company.

- 88 Deft. Mobile Pipe Line Co.'s First Set of Interrogatories to Pltf.
- 9-20 89 Tribe's Reply to counterclaim of Monona County.
- 90 Tribe's Request to deny motion for amendment to answer of Defts. State of Iowa & Conservation Commission & reply to counterclaim.
- 91 Tribe's Response to interrogatories propounded by Deft. Mobil Pipe Line Co.
- 9-27 92 Tribe's reply to counterclaim of Mobil Pipe Line.
- 93 Tribe's reply to counterclaim Defts. Weidner, et al.
- 94 Tribe's reply & motion to strike demand for jury trial by Deft. Mobil Pipe Line.
- 95 Tribe's reply & motion to strike demand for jury trial by Defts. Weidner et al.
- 10-12 96 Disclaimer by Deft. Monona County to land within the Barrett Survey Area of Blackbird Bend Tract, and Motion for Dismissal from that action. (also No. 234 in consolidated case)
- 10-20 97 Answer of Estate of Maude B. Hudgel, deceased.
- 1977
- 2-11 98 Second Set of interrogatories to Pltf. from Iowa Public Service.
- 3-10 99 Response of Tribe to Second Set of interrogatories from IPS.
- 3-17 100 Motion For Partial Summary Judgment by deft. Iowa Public Service
- 3-17 101 Brief In Support of Motion For Partial Summary Judgment.

- 3-28 102 Tribe's Memorandum in response to Deft.'s Motion for Summary Judgment & Request for denial.
- 3-30 103 Deft. IPS Reply to Memorandum & response to Deft.'s Motion for summary judgment.
- 7- 8 104 Order on motion of 6-3-76 to dismiss Defts. Hazel I. Jacobson, Elmer W. Swan, Emily S. Blair and Frances J. Goodman: no resistance filed—hereby Ordered that Motion is Granted. (OB 21-23)

ATTORNEY'S FOR DEFENDANTS

Date	Attorney	Defendants
1975		
10-22	Ronald E. Runge 436 Davidson Bldg. Sioux City, Iowa 51101	Lloyd Fletcher
10-28	Wiley Mayne 300 Commerce Bldg. Sioux City, Iowa 51101	Hazel I. Jacobson Fred Sanders
	(on 9-9-76)	Maurice Louis Benjamin Rosalie Sanders Richard A. Ruth
	Dorothy Weinder Virginia Burns Rose Loraditch Mary Brennan Phylis Nelson Leslie Hickman Shirley Fender Robert Hickman Dorothy Queen Norman Queen	Ross O. Willey Willaday Farms, Inc. W. W. Virtue Ariel Virtue Vincent R. Willey Arthur Orr John H. Lund Lloyd Fletcher Cleo Cox
	Herbert Nelson Benjamin Charlotte J. Clark	Amena Ruth Ruth J. Lund Robert Orr.

- 11- 3 Maurice B. Nieland Darrell L. Sorenson
300 Toy National Bank Bldg.
Sioux City, Iowa 51101 Harold Sorenson
Harold M. Sorenson
Luea Sorenson
- 11-10 Philip Willson Northern Natural Gas
301 Park Bldg. Company.
Council Bluffs, Iowa 51501
- 11-12 P. L. Nymann Mid-American
383 Orpheum Electric Building Pipeline
Sioux City, Iowa 51101 Company.
- 11-13 Lyman L. Larsen Harold Jackson
1900 One First National Center
Omaha, Nebraska 68102
&
Jack W. Peters
501 Park Bldg.
Council Bluffs 51501
- 11-25 (Pro se) Ernest L. Olson
10417 Peoria Ave.
Sun City, Arizona
- 12- 1 E. F. Barnicle, Jr. American Telephone
T. F. Wobker & Telegraph Company.
811 Main St.
Kansas City, Missouri 64141
- 12- 1 Jack W. Peters Roy Tibbals Wilson
Edson Smith
3535 Harney St., Omaha 68131
- 12- 4 George F. Madsen James Brooks Benson
Charles R. Wolle
1109 Badgerow Bldg., S. City 51101
- 12- 8 Peter J. Peters RGP, Inc. and
233 Pearl Street Otis Peterson
Council Bluffs, Iowa 51501

12- 8	Bennett Cullison Harlan, Iowa 51537	State of Iowa and State of Iowa Conservation Commission.
12- 8	Dewie J. Gaul 383 Orpheum Elec. Bldg. Sioux City 51101	Iowa Public Service Co.
12-10	Lowell C. Kindig Michael W. Ellwanger 300 Toy National Bank Bldg. Sioux City 51101	The Travelers Insurance
1976		
1-15	Theodore T. Duffield 729 Insurance Exchange Bldg. Des Moines 50309	Regina Marie Torticilli
9- 2	Stephen W. Allen Monona County Courthouse Onawa, Iowa 51040	Monona County Attorney
9- 3	Steven A. Carter 215 Benson Bldg. Sioux City 51101	Jim McGuire, Referee Estate of Maude B. Hudgel
8-20	Robert R. Eidsmoe 200 Home Federal Bldg. P. O. Box No. 3086	Mobil Pipe Line Company

Notice of Appeal by Plaintiff May 9, 1977.

Notice of Filing Petition for Certiorari 7-28-78.

Consolidated Cases No. C 75-4024 & 4026 and C 75-4067
on January 26, 1976.

SUPREME COURT DOCKET

UNITED STATES DISTRICT COURT

No. C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,

Plaintiff,

vs.

HAROLD JACKSON, et al.,

Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, etc.,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT
COMPANY, et al.,

Defendants.

I, the undersigned Clerk of the United States District Court for the Northern District of Iowa, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

WITNESS my hand and seal of said Court this 16 day of November, 1978.

K. W. Fuelling, Clerk

(SEAL)

By: /s/ D. Henry, Deputy

Date	No.	Proceedings
1976		
1-26	71	Order on Motions & Consolidating Cases. (No. C 4024 & 4026).
	72	Defts. Wilson & Jackson Resistance to Tribe's Motion to have made permanent a survey line as a boundary line. (all 3 cases).
	73	Pltf.'s Motion to dismiss as to certain named defendants. (No. C75-4067) (30 signed disclaimers in separate file).
1-27	74	Pltf.'s Motion to amend—names of Glen & Grace Swan to be removed from list of disclaimers. (No. C75-4067).
1-29	75	Answer and Counter-Claim of Defendant Lloyd Fletcher (4067).
1-30	76	Defts. (Mayne) application for enlargement of time.
2- 4	77	Pltf.'s Motion to dismiss as to certain named defendant (Letha Jenkins) (No. C75-4067) (Disclaimer filed).
2- 5	78	Answer of Defts. Wilson, Jackson & Lakins (No. 4067).
	79	Answer of Deft. Northern Natural Gas Company (No. 4067).
	80	Interrogatories to Pltf. from Northern Natural Gas Co.
	81	Request for Production from Deft. Northern Natural Gas.

	82	Order granting (Mayne) Defts. until 2-19-76 to move or plead (final extension).
2-10	83	Answer & Counterclaim of Deft. IPS (No. 4067).
	84	Interrogatories to Pltf. from IPS.
	85	Request for production from Deft. IPS.
2-11	86	Motion to dismiss as to certain named deft. (James Brooks Benson) (disclaimer filed).
	87	Report of Omaha Tribe on farming procedures (No. 4024 & 4026) check received for \$24,585.79.
2-12	88	Order on motions; Deft. Iowa's filed 1-6-76 to modify temporary injunction; Pltf. Tribe's filed 1-21-76 to make permanent resurvey; Pltf. U. S. filed 1-22-76 for extension to comply with court order; Pltf. Tribe's to dismiss certain defts. ORDERED motion to make permanent resurvey denied; motion for extension of time granted; motions to dismiss granted; motion for modification of temporary injunction granted. Pltf. Tribe enjoined & restrained from any further alterations to lands character within court's previous injunctive decree to which State of Iowa claims an interest (certain prohibited alterations included) (OB 19-139).
	89	Answer and Counterclaim of Defendants Harold, Harold M., Luea and Darrell L. Sorenson (No. 4067).
	90	First Amendment To Answer and Counterclaim of Iowa Public Service Co. (No. 4067).
2-18	91	Deft. IPS Demand for trial by jury (No. 4067).
2-18	92	Tribe's Reply to request for production from Deft. IPS (No. 4067).

- 93 Tribe's Response to request for production of documents by Defts. Wilson & Lakin (No. 4026 & 4067).
- 94 Tribe's Reply to "First Amendment to answer & counterclaim of IPS" Deft. (No. 4067).
- 95 Tribe's Reply to answer & counterclaim of Deft. Fletcher (4067).
- 96 Tribe's Response to resistance of motion "to have made permanent" a survey line as filed by Defts. Wilson & Jackson. (all 3).
- 97 Tribe's Response to interrogatories presented by Defts. Wilson & Lakin (No. 4026).
- 2-19 98 Order granting Motion to dismiss as to Deft. James Brooks Benson (No. 4067) (OB 19-142).
- 2-19 99 Order extending time to comply with C.O. of 12-15-75 as to expenses to 2-23-76. U. S. granted until 3-8-76 to respond to interrogatories & request for production by Defts. Wilson & Lakin.
- 2-19 100 Defts. Sorensons Demand for jury trial (No. 4067).
- 101 Defts. Am. T & T Motion for more definite statement, w/statement in support attached (No. 4067).
- 102 Defts. (Mayne) Motion to dismiss (No. 4067).
- 103 Tribe's Answer to interrogatories submitted by Deft. IPS (No. 4067).
- 104 Tribe's Reply to answer & counterclaim of Deft. IPS (No. 4067).
- 2-23 105 Report To The Court As Per Order of December 15, 1975 (4024).

- 106 Stipulation In Re 1975 Wheat Crop and Expenses (4024 & 4026).
- 2-24 107 Defts. Wilson, Jackson, Peterson, & RGP for more definite statement & for time to object to report of Tribe (4024 & 26).
- 108 Deft. Travelers Insurance Answer (4024).
- 2-26 109 Defts. Wilson, Jackson & Lakins Demand for trial by jury (all).
- 3- 2 110 Order extending time for complying with court order of 12-15-76 as to expenses to 3-4-76.
- 3- 5 111 Report of Wilson & Jackson as per order of court 12-15-75 in re corn crop South of Barrett boundary.
- 3- 8 112 (USA) Pltf.'s Motion to strike jury trial demand, w/brief attached (4024).
- 3- 8 113 (Pltf. Tribe) Motion for order requiring reconciliation of land surveys (4067).
- 3- 9 114 Motion to Dismiss As To Certain Named Defendants (Disclaimers).
- 115 Answers To Interrogatories By Regina Marie Torticilli.
- 116 Reply to Answer and Counterclaim of Defendants Harold Sorenson, et al.
- 117 Reply To Counterclaim of Roy Tibbals Wilson et al.
- 118 Plaintiff's Motion To Amend.
- 119 Plaintiff's Motion For Summary Judgment. Response To Motion To Dismiss On Grounds of Statute of Limitations and Motion For Summary Judgment.

1976

- 3-10 120 Tribe's Reply to demands for jury trial filed and request for trial (4067), w/Memorandum in support attached.
- 3-12 121 Stipulation by Tribe & Deft. Agricultural & Industrial, that Deft. has until 3-29-76 to move or plead (4067).
- 3-15 122 Deft. Torticilli's Supplemental interrogatory to Pltf. (4067).
- 123 Order granting Deft. Agri. & Industrial until 3-29-76 to move (4067).
- 3-15 124 Pltf. U. S. A. Responses to request for production of documents, etc. under Rule 34 (4024).
- 125 Pltf. U. S. A. Answers to interrogatories of Defts. Wilson & Lakin (4024).
- 3-16 126 Motion to Dismiss as to Defts. Mrs. Howard Miller, Myrtle R. Riggs, Maude B. Hudgel Estate, George B. Boulden Estate, Elmer Swan, Ethel Parks, Charles H. Truelsen & Duane A. Dowd.
- 3-17 127 Resistance of Defendants Roy Tibbals Wilson et al. To The Reply Of Omaha Indian Tribe To Demands For Jury Trial.
- 128 Resistance To Motion Of Plaintiff, U. S., To Strike Demand For Trial By Jury Filed By Defendants Roy Tibbals Wilson et al.
- 3-18 129 Answer—Defendant Williams Pipeline Company.
- 3-19 130 Plaintiff's Motion To Amend Complaint by Adding Named Defendants.
- 131 Official Government Plat and Field Notes of the Dependent Resurvey of the Barrett Line.

- 3-22 132 Defts. Wilson & Jackson application to modify temporary injunction (4024 & 4026).
- 3-24 133 Defts. Wilson & Jackson Report & application re 1976 farming & access issues (Oral argument requested) (4024 & 4026).
- 3-24 134 Defts. Wilson & Jackson Application for order directing reimbursement of 1974 fall ground preparation & fertilizer expenses incurred for 1975 corn crop (4024 & 4026).
- 3-25 135 Pltf. Tribe Reapplication for access (4067).
- 3-25 136 Pltf. Tribe's Answers to Interrogatories by Northern Gas (4067).
- 3-26 137 Plaintiff's Response To Motion To Dismiss.
- 138 Plaintiff's Response To Supplementary Interrogatory from Regina Marie Torticilli.
- 3-29 139 Stipulation that Deft. Agricultural Co. may have until 4-8-76 move or plead (4067).
- 4- 2 140 Tribe's Response to application to modify temporary injunction & petition for denial of application (4067).
- 4- 5 141 Order on following motions: (OB 19-161)
 - 1. Deft.'s AT&T to make more definite & certain denied.
 - 2. Pltf. Tribe to supplement crop report by 4-16-76. Defts. objections by 5-3-76. Defts. Wilson, etc. to make more definite & certain denied in all other respects.
 - 3. Defts. to dismiss denied.
 - 4. Pltf. Tribe's to dismiss granted. (Mid-Continent Eastern Pipeline & Mid-American Pipeline).
 - 5. Defendant resurvey approved, unless modified by 4-16-76, or Pltf. Tribe shows just cause for disapproval.

6. Pltf. Tribe to amend complaint denied.
 7. Case No. 4067 severed with respect to issues of damages & all issues concerning lands not within the subject res of cases Nos. 4024 & 4026.
 8. Pltf. US & Pltf. Tribe to strike jury trial demand granted with respect to consolidated cases; ruling reserved on remainder of motion.
 9. Pltf. Tribe motion for partial summary judgment granted on those issues indicated in text and denied in remaining respects.
 10. Clerk directed to pay from Registry Fund the amount of \$5,495.05 to Roy Tibbals Wilson & Harold Jackson, jointly, and \$969.71 to RGP, Inc. & Otis Peterson, jointly.
 11. Defts. Wilson & Jackson to recover \$774.43 from Tribe at time of satisfaction of all 1975 corn crop expenses.
- 4-13 Mailed Checks No. 1667 for \$5495.05 (payable to Wilson & Jackson) & No. 1668 for \$969.71 (payable to RGP, Inc. & Peterson) to attorneys, Larsen & Peter Peters.
- 4- 9 142 Defts. Wilson & Jackson Resistance to reapplication for access.
- 143 Memorandum brief in support of resistance.
- 4-13 144 Pltf. Tribe's Withdrawal of motions pertaining to access.
- 4-14 145 Govt.'s Reply to Defts.' Resistance to motion to strike demand for jury trial (4024).
- 4-15 146 Motion to have accepted the plat and description filed 1-21-76 by Omaha Tribe and to have rejected the plat filed 3-19-76.

- 4-23 147 Additional interrogatories addressed to Pltf. USA by Defts. Wilson, Lakin & Jackson.
- 148 Additional Request for Production of documents, etc. under Rule 34.
- 4-26 149 Defts. Wilson, Jackson, RGP & Peterson Objections & Exceptions to crop report of Omaha Tribe.
- 4-30 150 Defts. Wilson, Jackson, RGP, Peterson, Lakin & State of Iowa application for possession pursuant to order of 6-5-75.
- 4-30 151 Government's Request for extension of time in which to respond to Omaha Tribe's Motion to have accepted the tribal plat of resurvey.
- 5- 5 152 Order assigning cases to Honorable Andrew W. Bogue, U. S. District Judge for District of South Dakota for disposition.
- 5- 7 153 Plaintiff's Interrogatories to Defendants.
- 154 Tribe's Resistance to application for possession pursuant to Order of 6-5-75, filed 4-30-76, by Wilson, Jackson, RGP, Lakin, Peterson & State of Iowa.
- 5-10 155 Amendment by Tribe to above resistance (correcting heading and case numbers).
- 5-14 156 Pltf.'s (USA) Resistance to Tribe's Motion to have accepted plat filed on 1-21-76.
- 5-17 157 Pltf.'s Resistance to Defts.' Application for possession.
- 5-24 158 Order of Judge Bogue that each paper filed in cases be accompanied by one extra copy for his use (OB 19-192).
- 5-24 159 Response by Tribe to objections & exceptions to the crop report of the Omaha Tribe.
- 5-27 160 Tribe's Motion to strike Pltf. (US) Resistance to Tribe's Motion to have plat accepted.

- 161 Tribe's Motion to strike unsworn statements.
- 162 Memorandum of Points & authorities in support of motion to strike.
- 6- 9 163 Deft. Travelers Ins. Answers to Interrogatories.
- 6-11 164 Notice of Appearance as Counsel of Record for Omaha Indian Tribe by William H. Veeder, Alexandria, Virginia.
- 6-14 165 Government's Answers To Interrogatories (additional).
- 166 Plaintiff's Resistance To Omaha Tribe's Motion To Strike.
- 6-16 167 Filing Of Affidavit In Support of Motion Dated May 27, 1976 By Omaha Tribe, To Strike.
- 168 Memorandum In Support of Motion To Strike.
- 6-21 169 Deft. State of Iowa's Answers to Pltf.'s Interrogatories.
- 6-23 170 Order granting Defts. until 6-30-76 to answer interrogatories of Pltf. USA.
- 6-25 171 Filing of Affidavit in Support of Motion Dated May 27, 1976, by Omaha Tribe to Strike.
- 6-29 172 Answers of Defts. Wilson, Jackson & Lakins to Interrogatories of Pltf. USA.
- 7- 1 173 Answers of Defts. RGP, Inc. & Peterson to interrogatories of Pltf.
- 7- 2 174 Pltf. Tribe's Motion for an early trial on the merits, w/affidavit of Chairman Edward L. Cline attached.
- 7- 6 175 Pltf. Tribe's Motion to show government rejection of its own BLM 3-2-76 plat; and acceptance of plat filed by Tribe.

- 7-19 176 Defts. Wilson, Jackson, RGP, & Peterson Answer to response by Omaha to objections & exceptions to crop report.
- 7-28 177 Plaintiff (U. S.) Resistance To Omaha Tribe's Motion To Show Government Rejection of its own B. L. M. March 2, 1976 Plat etc.
- 8-12 178 Order pursuant to agreement of counsel at informal conference, that attorneys to meet on 9-7-76 at 9:30 A. M. in U. S. Courthouse in Sioux City and accomplish certain items—stipulation of facts; exchange lists of witnesses & exhibits & any other agreements to facilitate case trial. A record to be kept and written statements of stipulations of facts & issues to be filed by 9-20-76 (OB 20-25).
- 8-12 179 Tribe's Reply to counterclaim of Defts. RGP, Inc. & Otis Peterson.
- 180 Motion by Tribe for partial summary judgment.
- 181 Memorandum of Points & authorities in support of Motion.
- 8-16 182 Interrogatories To Plaintiff United States of America by Defendants Roy Tibbals Wilson and Charles E. Larkin in Blackbird Barrett Cases.
- 183 Interrogatories To Plaintiff Omaha Indian Tribe by Defendants Roy Tibbals Wilson and Charles E. Lakin in Blackbird Barrett Cases.
- 8-27 184 Tribe's Resistance to application for order directing reimbursement of 1974 fall ground preparation & fertilizer expenses incurred for 1975 corn crop.

- 8-30 185 Order authorizing Court Reporter for conference on 9-7-76 and Clerk to arrange for compensation (OB 20-30).
- 9- 2 186 Motion for leave to file amendment to Answer of Deft. State of Iowa (copy attached).
- 9- 3 187 Motion by Tribe for a protective order against the Justice Department in the Tribe's presentation & prosecution of Cases Nos. 4026 & 4067.
- 9- 7 188 Pre-Trial Order, Proposed Agreed Facts of Pltf. the Tribe.
- 189 Part I, Pre-Trial Order of Pltf. the Tribe. List of Witnesses.
- 190 Part II, Pre-Trial Order of Pltf. the Tribe. List of Exhibits.
- 9- 9 191 Motion for leave to file amendment to answer of Defts. Wilson & Lakins (4024) (copy attached).
- 192 Motion for leave to file amendment to answer of Defts. Wilson & Lakin (4026) (copy attached).
- 193 Motion for leave to file amendment of Defts. Wilson, Jackson, & Lakins (4067) (copy attached).
- 9- 9 194 Response of Tribe to interrogatories propounded by Defts. Wilson & Lakin in Blackbird Barrett Cases.
- 9- 9 195 Tribe's Opposition to Motion for Summary Judgment by the Travelers Insurance Company (See No. 87 in Case No. 4067).
- 9-10 196 Tribe's Motion for hearing on Motion to Strike 3-2-76 Bureau of Land Management Survey.

- 197 Tribe's Motion to require completion of pre-trial process & preparation of final pre-trial order.
- 9-14 198 Order setting cases relating to the Barrett Survey area of the Blackbird Bend Tract for trial on 11-1-76 at 1:00 P. M. (OB 20-43).
- 199 Defts. State of Iowa, & Conservation Commission, Wilson, Jackson, Lakins, RGP & Peterson, Motion for Order setting additional preliminary pretrial conference.
- 9-17 200 Response of U. S. to interrogatories submitted by Defts. Wilson & Lakin.
- 201 Response of U. S. to Tribe's Motion for protective order against Dept. of Justice.
- 9-20 202 Tribe's Reply to amendments to answer of intervening Defts. Wilson & Lakin (4026).
- 203 Tribe's Reply to amendment to answer of Defts. Wilson, Jackson & Lakins.
- 204 Tribe's Proposed Agreed Facts & Joint Exhibits.
- 205 Exhibit Testimony from Pretrial Conference held on 9-7-76 submitted by Bennett Cullison, Jr.
- 206 Agreed Facts submitted by Peter J. Peters one of the attorneys for Defts. USA, Wilson, Lakin, RGP, Sorenson, State of Iowa, Jackson & Peterson.
- 207 U. S. Statement on disputed issue of facts and law (4024).
- 9-21 208 Statement of Defts. State of Iowa & Iowa Conservation Commission.
- 9-23 209 Tribe's response to Defts' Motion for order setting additional preliminary pretrial conference.

- 9-23 210 Deft. RGP Motion for leave to file amendment to answer (4024).
- 211 Deft. RGP & Peterson Motion for leave to file amendment to answer (4067).
- 9-23 212 Tribe's Motion to be permitted in the trial of consolidated cases to offer its evidence prior to that of Justice Dept. in 4024; to have the Justice Dept. aligned as an adversary in these consolidated cases.
- 9-23 213 Transcript of pretrial conference held on 9-7-76 (one copy only).
- 9-27 213(a) Tribe's Reply to amendment to answer of Defts. RGP & Peterson.
- 214 U. S. Objections to 4 filings attached as one pleading: (1) Objections to Tribe's proposed agreed facts & joint exhibits; (2) Resistance to State of Iowa's Motion to file amendment to its answer; (3) Response to Tribe's Motion to require completion of pretrial process; (4) Resistance to Defts. Wilson & Lakins Motion to amend answer.
- 215 U. S. Resistance to Tribe's Motion for hearing on motion to strike March 2, 1976 Bureau of Land Management survey (4024).
- 9-28 216 Defts. Wilson, Jackson, Lakins, RGP, Peterson, State of Iowa, & Iowa Conservation Motion for further discovery.
- 9-29 217 Defts. Wilson & Lakins motion for leave to file amendment to answer & withdrawal of previous motion (not ruled on) for leave to file amendment to answer (4024) (copy attached).
- 9-29 218 Showing in support of motions of Defts. Wilson, Lakin & Jackson for leave to file amendments to their answers.

- 9-29 219 Defts. Wilson & Jackson Motion to enter injunction in previously file application (4024 & 4026).
- 10- 1 220 Order Re. Defts. Motion, (Wilson, Jackson, Lakins, R. G. P., Peterson, State of Iowa and Conservation Commission) Tribe make expert witnesses, Clark & Robinson, available for deposition, providing defts. have exchanged exhibits (OB 20-5).
- 10- 4 221 Request by U. S. for admission by Defts. Wilson, Lakins, RGP, Jackson, Peterson, Travelers Ins. & State of Iowa of the truth of statement re. lands in paragraph 2 of complaint (4024).
- 10- 5 222 Answer of Defts. Wilson, Lakin & Jackson to request by the US for admission by Defts. (4024).
- 10- 6 223 Defts. Wilson, Jackson, Lakin, RGP, Peterson, State of Iowa & Conservation Comm. Motion to clarify order of 9-29-76 & to set date for reconvening preliminary pre-trial conference & for taking depositions.
- 10- 7 224 Pltf. (USA) Resistance to RFP's (sic) Motion for leave to file amendment to answer (4024).
- 10- 8 225 Answer of Deft. State of Iowa to request by U. S. for admission by Defts. (4024).
- 10-12 226 Order: On motion of 9-29-76 to clarify & to set date for PPTC, & consolidated with motion by Tribe to require completion of pre-trial process, phrase "exchange of exhibits" merely require parties to comply with local rule 23B; reconvening PPTC for 10 AM on 10-12-76; Counsel for Tribe have available for deposition on 10-14-76 at 2 PM their experts, Clark & Robinson: counsel for Tribe

- & US to direct their surveying experts to prepare for the Court topographical maps. (OB 20-57).
- 227 Order: On Motions—*State of Iowa* to amend answer—no resistance, motion granted: *Deft. Jackson* to amend answer—denied as would alter issues: *Defts. Wilson & Lakin* to amend—denied: *Deft. RGP* to amend—denied: *Deft. Peterson* to amend—denied: *Defts. Wilson & Jackson* to enter injunction in previously filed application—Pltf. Tribe enjoined & restrained from making any further alterations to character of those lands within the previous injunctive decree, roads, culverts, etc. (OB 20-58).
- 228 Order that counsel prepare & file with Clerk in S. City, proposed findings of fact & conclusions of law 1 week prior to trial & 3 copies be mailed to Judge Bogue (OB 20-59).
- 229 Answer of *Defts. RGP & Peterson* to request by US for admission by *Defts.* (4024).
- 230 Tribe's Motion to request payment for transcript.
- 231 Resistance by US to Tribe's 9-23-76 Motion to offer evidence & to align parties (4024).
- 232 *Deft. State of Iowa* Amendment to Answer (4024).
- 233 Tribe's Response to resistance of Justice Dept. to Tribe Motion of 9-23-76 to offer evidence & to align parties.
- 234 Disclaimer by *Deft. Monona County* to land within the Barrett Survey Area of Blackbird Bend Tract & Motion for dismissal from that action (4067).
- 10-14 235 *Deft. Travelers Ins.* Answer to request for admission filed by US (4024).

- 10-18 236 Tribe's Motion for order granting access across lands of *Deft. Sorenson* (4067).
- 10-22 237 Order: re. resurvey Tribe seeking to challenge accuracy made by Bureau of Land Management: Tribe has not exhausted its administrative remedies: differences insubstantial; therefore results of Bureau of Land Management's resurvey are adopted & will be lines of reference during course of trial: no evidence, for sole purpose to challenge resurvey, will be admitted at trial on the merits (OB 20-70).
- 10-22 238 *Govt.'s Answer* to *State of Iowa's* Counterclaim (4024).
- 10-22 239 *Deft. Sorenson* Proposed Findings of Fact & Conclusions of Law.
- 10-22 240 *Deft. Travelers Ins.* Suggested Findings of Fact & Conclusions of Law.
- 10-26 241 Order on Motions: (1) Application of *Deft. Wilson, Jackson, RGP, Lakin & State of Iowa* for possession of certain allotted land sold to non-tribal members—DENIED. (2) Motion by Tribe for partial summary judgment against *Peterson & RGP* relating to defenses asserted in answers of statute of limitation estoppel & laches & related defenses—GRANTED per order of 4-5-76, which dealt in part with such defenses. (3) Motion of *Deft. Monona County* for dismissal — GRANTED as to trial of lands within Barrett Survey only (OB 20-73).
- 10-26 242 Order on seating arrangement at trial, and terms to be used; presentation of evidence and with examination of witnesses in same order as reference of terms; neither Pltf. may cross-examine the other Pltf.'s witness.

- es, and no Deft. another Deft.'s witnesses (OB 20-74).
- 10-26 243 Order that daily transcript be prepared; cost divided seven ways (each Pltf. shall bear 1/7 of cost. Defts. Wilson, Jackson, Lakin together 1/7. Defts. RGP & Peterson 1/7. Defts. Sorenson 1/7. State of Iowa 1/7. Travelers Ins. 1/7) (OB 20-75).
- 10-26 244 Pltf. U. S. Submission of plats pursuant to Order of 10-7-76.
- 10-26 245 Pltf. U. S. Proposed Findings of Fact & Conclusions of Law.
- 10-26 246 Tribe's Index to Findings of Fact & Conclusions of Law.
- 10-26 247 Defts. Wilson, Lakins, RGP, Jackson, Peterson & State of Iowa Proposed Findings of Fact & Conclusions of Law.
- 10-27 248 Depositions of Dr. George R. Hallberg: Dr. Subhash C. Jain: Dr. John F. Kennedy: Dr. Raul S. McQuivey: Dr. Daryl B. Simons (separate file).
- 10-28 249 Order on Motions filed by Tribe on 9-3-76 & 9-23-76: Motion for Protective Order denied: Motion as to evidence—Tribe will be expected to offer its evidence first; Tribe will not be permitted to object to Govt. evidence, to cross-examine Govt. witnesses, or offer evidence in rebuttal to Govt. evidence (OB 20-77).
- 10-28 250 Deft. Sorenson Resistance to Tribe's Motion for order granting access.
- 251 Deft. Sorenson List of Exhibits.
- 10-29 252 Order: all parties to brief question of where risk of non-persuasion lies & submit briefs at commencement of trial; order & manner set out for presenting evidence (OB 20-77).

- 253 Transcript of pretrial conference Part II on 10-12-76 (one copy only—given to Judge B.).
- 11- 1 254 Pltf. (US) Memorandum on Burden of Proof (4024).
- 255 Deft. Travelers Ins. Brief on question of risk on nonpersuasion.
- 256 Deft. Sorenson Brief re. Risk of non-persuasion.
- 257 State of Iowa's Memorandum on question of burden of proof.
- 258 Tribe's Brief respecting question of where risk of nonpersuasion lies.
- 11- 5 259 Supplemental Memorandum of Law to Proposed Findings of Fact & Conclusions of Law submitted by Defts. Wilson, Lakins, RGP, Jackson, Peterson & State of Iowa.
- 11-15 260 Tribe's Motion & Objection to introduction of evidence by Justice Dept. in these consolidated cases.
- 261 Tribe's Motion to have this Court declare burden of proof resides with Defts.
- 262 Deft. Sorenson Brief regarding consolidation.
- 12- 3 263 Stipulation between Defts. "Iowa" & Sorenson that in event judgment finds lands are owned by Defts. & not by Tribe, that any issue between Iowa & Sorenson as to ownership of any of such land may be heard by separate trial, provided in Rule 42b. FRCP.
- 12- 6 264 (a) Deposition of E. M. Clark.
(b) Deposition of Charles S. Robinson behalf of Defts. Separate file (Fees: 323.90 &)
- 12- 7 265 Clerk's Court Minutes of trial from 11-1-76 to 12-6-76.

- 12- 8 266 Plaintiff (Tribe) Exhibits.
 267 Plaintiff (Government) Exhibits.
 268 Defendants Exhibits.
- 1977
- 1- 3 269 Order granting Motion of Tribe for access across land of Deft. Sorenson; further ordered that access shall be for time between Jan. 1, 1977 to Dec. 31, 1977 and shall be upon same terms & conditions as agreed between Tribe & Sorenson for 1976 (OB 20-110).
- 1-18 270 Defts. Wilson, Jackson, RGP & Peterson's Motion to clarify Court's Order of 1-3-77.
- 1-26 271 Tribe's Response to Motion to clarify court order of 1-3-77.
- 2- 3 272 Order on defendant's motion to clarify 1-3-77 Order: Tribe entitled to deduct expenses paid for access to land as a business expense in calculating "net profits" to be paid to Clerk of Court; Tribe to file its accounting for 1976 by 3-1-77; if decision on the merits were entered in favor of Defts. & against Pltfs. then preliminary injunction by which Pltfs. hold Blackbird Bend area would necessarily be dissolved, thus rendering question of access moot; Defts. Motion to more specifically limit access order be & hereby is denied (OB 20-125).
- 2-15 273 Proposed Findings of Fact, Conclusions of Law, and Decree, submitted by Defts. Wilson, Lakins, Jackson, State of Iowa, RGP, Peterson, Sorenson & Travelers (separate file) No. 273 thru 278.
- 274 Above Defendants' Brief on the Issue of Burden of Proof.
- 275 Govt. Plaintiff's Requested Findings of Fact and Conclusions of Law.

- 276 Government's Memorandum in support of its Requested Findings of Fact and Conclusion of Law.
- 277 Findings of Fact, Conclusions of Law, proposed by Omaha Indian Tribe, Plaintiff.
- 278 Brief of Defendants.
- 2-28 279 Crop Report for 1976 by Omaha Tribe.
- 3- 4 280 Tribe's Motion for Judgment, w/Memorandum of points & authorities in support of motion attached.
- 3- 7 281 Motion To Strike Brief of Defts. by Omaha Indian Tribe.
- 3- 9 282 Defts.' Resistance to Tribe's Motion to strike "Brief of Defts."
- 3-15 283 Defts.' Objections & exceptions to crop report of Omaha Tribe for 1976.
- 3-18 284 Order denying motion of Omaha Tribe to strike brief of Defts. (OB 20-148).
- 3-23 285 Order that the court reporting charges submitted by Catherine Clark in amount of \$172.20 for pretrial conference taken on 9-7-76 to be paid by the parties in same manner & according to same division as was used in payment of daily transcript of the trial (OB 20-156).
- 3-28 286 Tribe's Response to Objections & Exceptions to Crop Report of Omaha Tribe for 1976.
- 5- 4 287 Letter from Judge Bogue to Attorneys filed as part of the record because of the unique nature of this case.
- 288 Memorandum Opinion.
- 289 Findings of Fact and Conclusions of Law.

290 DECREE: (1) Each & every one of the Findings of Fact & Conclusions of Law are by reference made a part hereof.

(2) The clear & convincing evidence is that the original "Barrett Survey" lands & accretions thereto have been entirely eroded & washed away by the erosive force of the river since 1867. The land in this litigation was not left by avulsive action of the river, but was formed by accretion to the riparian land on the Iowa side of the river, commencing sometime after 1867 & defendants' title is derived therefrom.

(3) Plaintiffs' prayers for relief are hereby denied, & judgment given to defendants on their counterclaims, & as between the defendants on the one hand & the plaintiffs on the other hand, title to the Barrett Survey land is quieted in defendants as their respective interest may appear.

5- 4 290 (Decree continued):

(4) All prior injunctions or orders of this Court to the contrary are dissolved.

(5) The preliminary injunction entered 6-5-75, giving possession of the Barrett Survey area to the Omaha Indian Tribe is hereby vacated, dissolved and set aside.

(6) All monies from plaintiffs' farming operations deposited with the Clerk are the property of the defendants as their interests may appear.

(7) Causes No. C 75-4024 & C 75-4026 and that portion of C-75-4067 involved in this trial are dismissed, without costs to either party (dated & signed on 5-2-77 — Judge Bogue) (OB 20-192).

5- 6 291 Motion For Stay of the Decree Entered 5-4-77 by Pltf. Omaha Indian Tribe.

5- 9 292 NOTICE OF APPEAL from Decree entered 5-4-77:

Copies mailed by Wm. H. Veeder on 5-9-77 to:

Donald O'Brien, P. O. Box 3223, Sioux City, Iowa 51102.

James L. Clear, Dept. of Justice, Washington, D. C. 20530.

Edson Smith, 3535 Harney St. Omaha, Nebraska 68102.

Thomas R. Burke, S. 1900 First National Center, Omaha, Nebr.

Jack W. Peters, 505-11 Park Bldg. Council Bluffs, Iowa 51501

Peter J. Peters, 233 Pearl St. Council Bluffs, 51501.

Phillip J. Willson, 301 Park Bldg. Council Bluffs, Ia. 51501

Bennett Cullison, Jr. Harlan, Iowa 51537.

Lowell Kindig, 300 Toy Bank Bldg. Sioux City, Iowa 51101.

Maurice B. Nieland, 300 Toy Bank Bldg. Sioux City, Iowa.

Wiley Mayne, 300 Commerce Bldg. Sioux City, Iowa 51101.

Theodore Duffield, 729 Insurance Exchange Bldg. Des Moines, Iowa.

P. L. Nymann, 383 Orpheum Electric Bldg. Sioux City, Iowa.

Certified copies of Notice of Appeal, Letter of Judge Bogue to Attorneys filed 5-4-77; Memorandum Opinion filed 5-4-77; Findings of Fact and Conclusion of Law filed 5-4-77; and Decree filed 5-4-77; Docket sheets of Consolidated cases and docket sheets of cases C 75-4024, C 75-4026 and C 75-4067 mailed to Robert C. Tucker, Clerk, U. S. Court of Appeals, St. Louis, Missouri 53101, by Clerk of U. S. District Court, Sioux City, Iowa.

- 5-11 293 Defts.' Resistance To Motion Of Pltf.'s Omaha Indian Tribe For Stay of Decree Entered May 4, 1977, and Defts.' Motion For Further Relief.
- 5-12 294 NOTICE OF APPEAL by U. S. A. of decree enter 5-4-77: Copies mailed by U. S. Attorney's office to attorneys of record; Certified copies of Notice of Appeal and certified copies of Supplemental docketing mailed to Robert C. Tucker, Clerk, U. S. Court of Appeals, 8th Circuit, St. Louis, Mo. 53101, by Clerk of U. S. District Court, Sioux City, Iowa.
- 5-13 295 Order: clarification of Decree of 5-4-77: Motion of Pltf. Tribe for stay of Decree denied (OB 20-198).
- 5-13 FILED ORDER of Judge Bogue TO TRANSFER EXHIBITS. Exhibits received from Janet M. Hansen, Deputy Clerk, Rapid City on May 13, 1977.
- 1978
- 9-12 296 Motion For Temporary Restraining Order and Preliminary Injunction by State of Iowa.
- 297 Motion For Temporary Restraining Order and Preliminary Injunction by defts. Rupp and Weaver.
- 9-18 298 Tribe's Motion for extension of time.

- 10- 2 299 Tribe's Answer to State of Iowa's Motion for TRO & PI.
- 300 Tribe's Answer to Defts. Rupp & Weaver Motion.
- 10-20 301 Order denying State of Iowa's motion for TRO (OB 22-77).
- 302 Order denying Rupp & Weaver's Motion for TRO (OB 22-78).
- 10-23 303 Order—Cases Nos. 4024, 4026 & 4067, except any portions of said cases already finally disposed of by the undersigned Court, are assigned to the Honorable Edward J. McManas, for disposition (signed by Judge Bogue) (OB 22-79).
- 10-24 304 Pltf.'s petition for temporary restraining order and preliminary injunction w/affidavits attached.
- 305 Order: Monona County & its Board of Supervisors shall forthwith remove barricade erected across the vacated Monona County road, and Defts. Henderson & Durr, & Board of Supervisors are restrained from interfering with the use by the Omaha Indian Tribe of the vacated road and the access thereof; Pretrial hearing on preliminary injunction set for 11:30 A.M. 11-2-78, in S. C. Hearing in courtroom at 1:00 P.M. 11-2-78 (OB 22-80).
- 10-26 306 Order: pursuant to 28 USC Sec. 455 (a), this Court hereby disqualifies itself from hearing or determining any further proceedings in the cases (dated 10-19-78) signed by Andrew W. Bogue (OB 22-82).
- 10-31 307 Tribe's Motion to vacate setting for a pre-trial hearing on 11-2-78 and the hearing on preliminary injunction, w/stipulation in re:

Alma Schmidt Henderson and Gladys Durr attached.

- 11- 2 308 Tribe's Motion for extension of time to have continued the TRO as it pertains to Monona County for 10 days.
- 309 Order (re: Henderson & Durr) pursuant to Stipulation dated 10-31-78 attached. Counsel have agreed to have made permanent the TRO dated 10-24-78 (copy attached); to vacate hearing date on Petition of Tribe for preliminary injunction (OB 22-).
- 310 Order, pursuant to stipulation dated 11-2-78 (attached signed by Allen & Veeder); counsel have agreed to have made permanent TRO dated 10-24-78 (copy attached); Tribe to be responsible for proper road markings & maintenance; to vacate hearing on petition for preliminary injunction; Tribe will maintain a movable "zebra board" for purposes of ingress & egress (OB 22-85).
- 11- 6 311 Marshal's services on Order & Petition for temporary restraining order & preliminary injunction on 10-24 & 10-26 (Fees: \$42.00).

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal from Northern District of Iowa

Case No. 77-1384

OMAHA INDIAN TRIBE, Treaty of 1854 with the U. S.
(10 Stat. 1043), Organized pursuant to the Act of 6/18/34
(48 Stat. 984; 25 USC 476) as amended,

Appellant,

vs.

Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, The State of Iowa, Darrell L., Harold, Harold M. and Luea Sorenson, State Conservation Commission of the State of Iowa,

Appellees.

William H. Veeder

Attorney for Appellant

Peter J. Peters

Edson Smith

Robert H. Berkshire

Lowell C. Kindig

Thomas R. Burke

Lyman L. Larsen

Bennett Cullison, Jr. for State of Iowa

and State of Iowa Conservation Commission

Attorneys for Appellees

No. Below: C75-4024/C75-2046/C75-4067

Judge Below: Bogue

Date of Judgment: May 4, 1977

Notice of Appeal Filed: May 9, 1977

Date	Nr.	Proceedings
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1977

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|------|---|---|
| 5-11 | 1 | Cert. copies Notice of Appeal, Docket Entries of D. Ct., Copy of D. Ct. Findings of Fact and Judgment and Letter of Judge Bogue dated 5/2/77. |
| 5-11 | 2 | Request for docketing fee. |
| 5-12 | | Docketed appeal. |
| 5-12 | 3 | Appearance for appellant. |
| 5-12 | | Received copies of D. Ct. titles & lawyers (with No. 1). |

- 5-12 4 Appellant's Motion for stay pending appeal, to restore injunction and for immediate hearing.
- 5-13 5 Order: Appellants' motions for stay pending appeal and restoration of injunction are granted and the previous injunction is restored; appellees are given until Tuesday, May 17, 1977, to respond to the motion for stay pending appeal; appeals to be expedited and submitted at the June session in St. Paul, MN.
- 5-16 6 Response and resistance of appellees to motions for stay pending appeal and motion to vacate immediate temporary stay and request for immediate hearing, with 77-1387.
- 5-16 7 Appearance appellees.
- 5-16 8 Certified copy order of District Court, with 77-1387.
- 5-17 9 Appearance appellees.
- 5-19 10 Appearance appellees.
- 5-19 11 Appearance appellees.
- 5-23 Argued and submitted on motion for stay (with 1387) to Judges Lay, Stephenson, Webster. William H. Veeder and Edward Shawaker, Dept. of Justice for appellants; Peter J. Peters and Edson Smith for appellees. Rebuttal by Mr. Veeder. Tape to law clerk 8-26
- 5-24 12 Order: Appellant's motion for stay pending appeal and restoration of injunction has been considered by the court and motion for stay pending appeal is granted and the previous injunction restored; court expresses no opinion as to the merits of the appeals; court's previous order about expediting will stand; all briefs will be served and filed on or before June 10, 1977, and case will be submitted to

- the court the week of June 13, 1977, in St. Paul, Minnesota.
- 5-24 13 "Chronology of Significant Farming Problems" etc. submitted by counsel for appellees (with 1387).
- 5-26 Transferred to JUNE session, w/1387.
- 6- 6 14 Mo. aplnt. for lv. to file overlength brief.
- 6- 6 Received overlength brief aplnt.
- 6- 6 RECEIVED ORIGINAL AND 2 COPIES DESIGNATED RECORD, with 1387. 7 VOLS. EACH.
- 6- 7 15 Appendix. To court 6-7.
- 6- 7 16 Order: Appellant's motion for leave to file enlarged brief is granted; clerk directed to file previously tendered sixty-one page brief.
- 6-13 18 Motion of appellant for leave to file reply brief after oral argument.
- 6-13 Arg. & sub. today, Stephenson, Henley. William H. Veeder (tribe) and Edward Shawaker, Dept. of Justice for aplnts. Edson Smith and Peter J. Peters for appellees. Concl. by Veeder. Recorded v. 1387.
- 6- 7 17 Brief appellant, Omaha Indian Tribe.
- 6-10 19 Brief of appellees.
- 6-10 20 Appendix to brief of appellees.
- 6-13 21 Appearance appellee.
- 6-13 RECEIVED letter from Nieland that he will not be present for o/a.
- 6-27 22 Reply Brief aplees w/ser.
- 6-27 23 Rep. brf. aplnt.
- 6-27 24 Ser. w/rep. brf. aplnt.
- 6- 5 25 Rec'd. ser. for brf. aplnt. Omaha Indian.

1978

- 4-11 26 Opinion by Judge Lay (Printed & Published) w/77-1387.
- 4-11 27 JUDGMENT: Judgment of Dist. Ct. is vacated & cause is remanded to the district court w/77-1387.
- 4-24 28 Petition of appellees for rehearing w/1387.
- 4-24 29 Suggestion of appellees for rehearing en banc w/1387.
- 4-24 30 Certificate of service of appellees' petition for rehearing and suggestion for en banc w/1387.
- 4-25 31 Appellant's bill of costs.
- 5- 2 32 Order: Petition for rehearing en banc denied; petition for rehearing also denied (with 1387).
- 5-12 33 Mo. appellees for stay of mandate with 1387.
- 5-19 34 ORDER: Issuance of mandate stayed for 30 days from this date. If within that time a petition for writ of certiorari is filed, stay shall continue until final disposition of case by Supreme Court with 77-1387.
- 6- 9 35 Mo. appellees for further stay of mandate, with 77-1387.
- 6-15 36 ORDER: Issuance of mandate stayed until 8/1/78 pending certiorari proceedings (w/77-1387).
- 7-28 Received telephone notification of the docketing of petition for writ of certiorari in Case No. 78-161, State of Iowa and State Conservation Commission of the State of Iowa, Petitioners, v. Omaha Indian Tribe and U. S. A., Respondents, with 77-1387.
- 7-28 Received telephone notification of the docketing of petition for writ of certiorari as Case

- No. 78-160, Roy Tibbals Wilson, Charles Lakin, Petitioners, v. Omaha Indian Tribe and U. S. A., Respondents, with 77-1387.
 - 7-28 Received telephone notification of the docketing of petition for writ of certiorari as Case No. 78-162, R. G. P., Inc., Travelers Insurance Company, and Otis Peterson, Petitioners, v. Omaha Indian Tribe and U. S. A., Resps., with 77-1387.
 - 8- 4 37 Notice of filing petition for writ of certiorari to Supreme Court of United States as Case No. 78-160 (as of 7/28/78), with 77-1387.
 - 8- 4 38 Notice of filing petition for writ of certiorari to Supreme Court of United States as Case No. 78-161 (as of 7/28/78), with 77-1387.
 - 8- 4 39 Notice of filing petition for writ of certiorari to Supreme Court of United States as Case No. 78-162 (as of 7/28/78), with 77-1387.
 - 8- 7 40 Clerk's certificate evidencing the docketing of petition for writ of certiorari in Case No. 78-160, with 77-1387.
 - 8- 7 41 Clerk's certificate evidencing the docketing of petition for writ of certiorari in Case No. 78-161, with 77-1387.
 - 8- 7 42 Clerk's certificate evidencing the docketing of petition for writ of certiorari in Case No. 78-162, with 77-1387.
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GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal from Norther District of Iowa

Case No. 77-1387
with No. 77-1384

United States of America,
Appellant,
vs.

Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin,
R. G. P. Incorporated, an Iowa corporation, Harold Jack-
son, Otis Peterson, Travelers Insurance Company and
the State of Iowa,

Appellees.

James W. Moorman, Department of Justice
Edmund B. Clark, Department of Justice
Raymond N. Zagone, Department of Justice
James J. Clear, Department of Justice
Edward Shawaker, Department of Justice
Attorneys for Appellant

Peter J. Peters
Lowell C. Kindig
Thomas R. Burke
Lyman L. Larsen
Attorneys for Appellees

No. Below: C75-4024

Judge Below: Bogue

Date: May 4, 1977

Notice of Appeal Filed: May 11, 1977

Date Nr. Proceedings
1977

5-12 Docketed Appeal.

- 5-12 1 Motion for Stay Pending Appeal, to Restore Injunction and for Immediate Hearing, & Memorandum in Support.
- 5-12 2 Copies of District Court Memorandum and Order.
- 5-12 3 Appearance for United States, Appellant.
- 5-16 4 Cert. copies Notice of Appeal and Docket Entries (Suppl. to those previously sent in 77-1384).
- 5-13 Order: Appellants' motions for stay pending appeal and restoration of injunction are granted and the previous injunction is restored; appellees are given until Tuesday, May 17, 1977, to respond to the motion for stay pending appeal; appeals to be expedited and submitted at the June session in St. Paul, MN. w/77-1384.
- 5-16 Response and resistance of appellees to motions for stay pending appeal and motion to vacate immediate temporary stay and request for immediate hearing, with 77-1384.
- 5-16 Appearance appellees w/77-1384.
- 5-16 Certified copy order of District Court, with 77-1384.
- 5-19 Appearance appellees w/77-1384.
- 5-19 Appearance appellees w/77-1384.
- 5-23 5 Appearance for appellant.
- 5-24 Order: Appellant's motion for stay pending appeal and restoration of injunction has been considered by the court and motion for stay pending appeal is granted and the previous injunction restored; court expresses no opinion as to the merits of the appeals; court's previous order about expediting will stand;

all briefs will be served and filed on or before June 10, 1977, and case will be submitted to court the week of June 13, 1977, in St. Paul, Minnesota w/77-1384.

- 5-24 Argued and submitted on motion for stay (with 1384) to Judges Lay, Stephenson and Webster. William H. Veeder and Edward Shawaker, Dept. of Justice for appellants; Peter J. Peters and Edson Smith for appellees. Rebuttal by Mr. Veeder.
- 5-24 "Chronology of Significant Farming Problems" etc. submitted by counsel for appellees (with 1384).
- 5-26 Transferred to JUNE session w/1384.
- 6- 6 RECEIVED ORIGINAL AND 2 COPIES DESIGNATED RECORD, with 1384. 7 VOLS. EACH.
- 6-13 Arg. & Sub. to Judges Lay, Stephenson, Henley. William H. Veeder (tribe), Edward Shawaker, Dept. of Justice for aplnts. Edson Smith and Peter J. Peters for appellees. Concl. by Veeder. Recorded w/1384.
- 6- 9 6 *Brf. aplnt.*
- 6- 9 7 *Ser. w/brf. aplnt.*
- 6-10 8 *Brf. aplees w/ser.*
- 7-11 9 *Rep. brf. aplnt.*
- 7-11 10 *Ser. w/rep. brf. aplnt.*
- 1978
- 4-11 Opinion by Judge Lay. (Printed & Published) w/77-1384.
- 4-11 JUDGMENT: Judgment of Dist. Ct. is vacated & cause is remanded to district court, w/77-1384.

- 4-20 11 Appellant's waiver of costs.
- 4-24 Petition of appellees for rehearing w/1384.
- 4-24 Suggestion of appellees for rehearing en banc w/1384.
- 4-24 Certificate of service of appellees' petition for rehearing w/suggestion for en banc, w/a1384.
- 5- 2 Order: Petition for rehearing en banc denied; petition for rehearing also denied (with 1384).
- 5-12 Mo. appellees for stay of mandate, with 1384.
- 5-19 ORDER: Issuance of mandate stayed for 30 days from this date. If within that time a petition for writ of certiorari is filed, stay shall continue until final disposition of the case by the Supreme Court, w/1384.
- 6- 9 Mo. appellees for further stay of mandate, with 1384.
- 6-15 ORDER: Issuance of mandate stayed until 8/1/78 pending certiorari proceedings (w/77-1384).
- 7-28 Received telephone notification of the docketing of petition for writ of certiorari as Case No. 78-161, State of Iowa and State Conservation Commission of the State of Iowa, Petitioners, v. Omaha Indian Tribe and U. S. A., Respondents, with 77-1384.
- 7-28 Received telephone notification of the docketing of petition for writ of certiorari as Case No. 78-160, Roy Tibbals Wilson, Charles Lakin, Petitioners, v. Omaha Indian Tribe and U. S. A., Respondents, with 77-1384.
- 7-28 Received telephone notification of the docketing of petition for writ of certiorari as Case

No. 78-162, R. G. P., Inc., Travelers Insurance Company, and Otis Peterson, Petitioners, v. Omaha Indian Tribe and U. S. A., Respondents, with 77-1384.

- 8- 4 Notice of filing petition for writ of certiorari to Supreme Court of United States as Case No. 78-160 (as of 7/28/78), with 77-1384.
 - 8- 4 Notice of filing petition for writ of certiorari to Supreme Court of United States as Case No. 78-161 (as of 7/28/78), with 77-1384.
 - 8- 4 Notice of filing petition for writ of certiorari to Supreme Court of United States as Case No. 78-162 (as of 7/28/78), with 77-1384.
 - 8- 7 Clerk's certificate evidencing the docketing of petition for writ of certiorari in Case No. 78-160, with 77-1384.
 - 8- 7 Clerk's certificate evidencing the docketing of petition for writ of certiorari in Case No. 78-161, with 77-1384.
 - 8- 7 Clerk's certificate evidencing the docketing of petition for writ of certiorari in Case No. 78-162, with 77-1384.
-

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, CHARLES G. LAKIN,
FLORENCE LAKIN, R. G. P., INCORPORATED, an
Iowa Corporation, HAROLD JACKSON, OTIS PETER-
SON, TRAVELERS INSURANCE COMPANY and the
STATE OF IOWA,

Defendants.

(Filed May 19, 1975)

COMPLAINT TO QUIET TITLE AND
FOR INJUNCTIVE RELIEF

CLAIM I

1. The United States is plaintiff in this action and this court has jurisdiction under 28 U. S. C. 1345.

2. The United States owns land in Monona County, Iowa, which is described as follows:

All descriptions are from the T. H. Barrett Survey.

Township 24 north, Range 10 east, 6th P.M. (Plat approved October 2, 1867).

Section 10, all that portion east of the 1943 Iowa-Nebraska compact line.

Section 11, lots 3, 4, 5, 6 and 7, NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, and all that portion of lots 1 and 2 east of the 1943 Iowa-Nebraska compact line, except certain lands allotted to individual members of the Tribe and sold to non-members.

Section 13, lots 1, 2, 3 and 4, S $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$.

Section 14, lot 1, NW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, S $\frac{1}{2}$, except certain lands allotted to individual members of the Tribe and sold to non-members.

Section 15, all that portion east of the 1943 Iowa-Nebraska compact line.

Section 22, all that portion east of the east or left bank of the present Missouri River.

Section 23, lots 1 and 2, N $\frac{1}{2}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$, and all that portion of lot 3 and the W $\frac{1}{2}$ NW $\frac{1}{4}$ east of the east or left bank of the present Missouri River.

Section 24, lots 1, 2, 3 and 4.

Township 24 north, Range 11 east 6th P.M. (Plat approved October 2, 1868).

Section 17, lots 1, 2, 3 and 4.

Section 18, lots 1, 2, 3 and 4, S $\frac{1}{2}$ N $\frac{1}{2}$ S $\frac{1}{2}$.

Section 19, lots 1, 2, 3 and 4.

Section 20, all of the fractional section.

The lands described are believed to contain approximately 2900 acres.

In addition to the above-described lands, the plaintiff claims for the use and benefit of the Omaha Tribe of Indians all lands in the bed of the Missouri River as it existed when the Omaha Indian Reservation was created extending from the lands described to the center of the main channel of the River.

3. The lands described in paragraph 2 are a part of the Omaha Indian Reservation to which the United

States holds title for the use and benefit of the Omaha Tribe of Indians.

4. The Omaha Tribe of Indians and members of that Tribe are now in possession of the lands described in paragraph 2.

5. The defendants, or some of them, are claiming some right to title or interest in and to the lands described in paragraph 2 and are asserting the right to possession of those lands. The claims of defendants are null and void and of no effect.

6. The plaintiff is entitled to a judgment quieting its title to the lands described in paragraph 2 to be held for the use and benefit of the Omaha Tribe of Indians, upholding the right of possession of the Omaha Tribe and its members to those lands, and declaring that the defendants have no right to title or interest in and to such lands and no right to the possession thereof.

7. The plaintiff and the Omaha Tribe of Indians will suffer irreparable injury unless judgment is entered by this court upholding their title and right to possession of the lands described in paragraph 2.

WHEREFORE, the plaintiff prays that judgment be entered as follows:

(a) For a preliminary injunction maintaining the Omaha Tribe and its members in possession of the lands described in paragraph 2 hereof until the rights of the parties of this action can be determined by this court.

(b) For a judgment quieting the title of the United States to the lands described in paragraph 2 for the use

and benefit of the Omaha Tribe of Indians; declaring that defendants have no right to title in or to such lands, or any of them; and enjoining the defendants from asserting any title to such lands or interfering in any way with the possession, use and occupancy of such lands by the United States, the Omaha Tribe and its members.

(c) For such other relief as the court may find justified and for the costs of this action.

CLAIM II

8. Plaintiff adopts and incorporates paragraphs 1 through 7 above.

9. Defendants Harold Jackson and Otis Peterson heretofore on or about April 23, 1975, filed a petition in the District Court of Iowa in and for Monona County which appears in the records of that court as Equity No. 18965, a copy of which is attached to this complaint. Named as defendants therein are six Indians in their individual capacity and as representatives of all members of the Omaha Tribe of Nebraska, their agents, employees or representatives.

10. The plaintiffs in Equity No. 18965 claim to be tenants in actual occupancy of a portion of the lands described in paragraph 2 of this complaint and seek Temporary and Permanent Writs of Injunction prohibiting members of the Omaha Tribe from occupying said lands or interfering with Jackson's and Peterson's farming of the land claimed by them. The purpose and effect of the petition in Equity No. 18965 is to challenge the title and possession of the United States and of the Omaha Tribe of Nebraska to those lands claimed by Jackson and Peter-

son. The United States is an indispensable party to Equity No. 18965. It is not a party to Equity No. 18965 and cannot be made a party to that action. By filing this action, the United States has brought before this court all interested parties so that all conflicting claims may be litigated in one action. Any judgment entered in this action will be binding upon the Omaha Tribe of Nebraska and its officers since they are represented by the United States.

11. The United States is entitled to have title to the property claimed by it on its own behalf and on behalf of the Omaha Tribe of Nebraska quieted against any claims by defendants Jackson and Peterson.

12. Equity No. 18965 is an attempt by defendants Jackson and Peterson to wrest possession from the United States and its wards in an action to which the United States is not and cannot be made a party, to the permanent and irreparable injury of the United States and its Indian wards. The mere pendency of the state court action constitutes a threat against and an interference with the substantial rights of the United States and its wards, and threatens the jurisdiction of this court to hear and determine actions brought by the United States to quiet title to land.

WHEREFORE plaintiff prays:

(a) That this court enter an order permanently enjoining defendants Jackson and Peterson, their agents, employees, or assigns and all persons in active concert or participation with them from prosecuting or attempting to prosecute the action entitled Jackson, et al. v. Cline, et al., Equity No. 18965, In the District Court of Iowa in

and for Monona County, insofar as that action relates to any lands described in paragraph 2 of this complaint;

(b) For an order permanently enjoining defendants Jackson and Peterson and their agents, employees, or assigns and all persons in active concert or participation with them from enforcing or attempting to enforce an order entered in Equity No. 18965 on or about May 15, 1975, which plaintiff is informed and believes prohibits certain members of the Omaha Tribe from maintaining possession of a portion of the lands described in paragraph 2 of the complaint and/or prohibiting them from interfering with farming activities by defendants Jackson and Peterson;

(c) For preliminary injunction restraining defendants Jackson and Peterson and their agents, employees or assigns and all persons in active concert or participation with them from prosecuting or attempting to prosecute Equity No. 18965 or enforcing or attempting to enforce the order entered therein on or about May 15, 1975, until the rights of the parties in this action can be determined by this court;

(d) For such other and additional relief as may be just and proper.

EVAN L. HULTMAN
United States Attorney

By /s/ Robert L. Sikma
Assistant United States Attorney
Northern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75 4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants.

SEPARATE ANSWER AND COUNTERCLAIM
OF DEFENDANT OTIS PETERSON

Comes now the defendant Otis Peterson and for his answer to the plaintiff's complaint and his counterclaim states:

ANSWER TO CLAIM I

1. He admits the allegations of Paragraph 1 of said Claim I.
2. He denies the allegations of Paragraph 2 of Claim I and alleges that all of the land described in that paragraph has been totally washed away and destroyed by the Missouri River.
3. He denies the allegations of Paragraph 3 of said claim.
4. He denies the allegations of Paragraph 4 of said claim.
5. He denies the allegations of Paragraph 5 of said claim and alleges that he is the tenant under a written lease and an extension thereof, a true copy of which is

attached hereto and made a part hereof, and that his landlord under that lease, RGP, Inc., is the owner of the following described real estate:

(Land description omitted in printing.)

6. He denies the allegations of Paragraph 6 of said claim.

7. He denies the allegations of Paragraph 7 of said claim.

ANSWER TO CLAIM II

8. He incorporates herein as his answer to Paragraph 8 of said Claim II Paragraphs 1 through 7 of his answer to Claim I.

9. He admits the allegations of Paragraph 9 of said claim.

10. He denies the allegations of Paragraph 10 of said claim except that he admits that in the described action in the District Court of Iowa in and for Monona County, he and his co-plaintiff, Harold Jackson, sought temporary and permanent writs of injunction against various named and described persons who had come upon the land with respect to which said persons are tenants and who have interfered with the lawful possession of this defendant and the said Harold Jackson. Temporary injunctions have been granted by that court against the named and described defendants in that action.

11. He denies the allegations of Paragraph 11 of said claim.

12. He denies the allegations of Paragraph 12 of said claim.

COUNTERCLAIM FOR INJUNCTION

13. He incorporates herein the allegations of Paragraph 5 of his answer to Claim I.

14. He incorporates herein the allegations of Paragraphs 9 and 10 of his answer to Claim II.

15. He is entitled to injunctive relief from this Court to maintain his lawful possession of the land of which he is the tenant and to prevent the plaintiff and all other persons from interfering with his right to the possession of that land.

WHEREFORE, defendant, Otis Peterson, prays that the Court dismiss plaintiff's complaint at plaintiff's cost and that the Court enter preliminary and permanent injunctions against plaintiff and all other persons (except defendants, their agents, employees and successors in interest) from interfering with the right to possession of the land described above of which this defendant is the lawful tenant. Said defendant prays for all such other and further general equitable relief as shall be deemed just by the Court.

By /s/ Peter J. Peters
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Council Bluffs, Iowa 51501
Telephone No. 712-328-3157

Attorneys for Defendant Otis Peterson

(Proof of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4024

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

ROY TIBBALS WILSON, et al.,
Defendants.

SEPARATE ANSWER AND COUNTERCLAIM
OF DEFENDANT, HAROLD JACKSON

(Filed June 9, 1975)

Comes now defendant, Harold Jackson, and for his
answer to plaintiff's complaint and counterclaim states:

ANSWER TO CLAIM I

1. He admits the allegations of paragraph 1 of said Claim I.
2. He denies the allegations of paragraph 2 of Claim I and alleges that all of the land described in that paragraph has been destroyed by the Missouri River.
3. He denies the allegations of paragraph 3 of said Claim.
4. He denies the allegations of paragraph 4 of said Claim.
5. He denies the allegations of paragraph 5 of said Claim and alleges that he is the tenant under a written lease, a true copy of which is attached hereto and made a part hereof and that his landlord under that lease, Roy

Tibbals Wilson, is the owner of the following described real estate:

(Land description omitted in printing.)

6. He denies the allegations of paragraph 6 of said Claim.
7. He denies the allegations of paragraph 7 of said Claim.

ANSWER TO CLAIM II

8. He incorporates herein as his answer to paragraph 8 of said Claim II paragraphs 1 through 7 of his answer to Claim I.
9. He admits the allegations of paragraph 9 of said Claim.
10. He denies the allegations of paragraph 10 of said Claim except that he admits that in the described action in the District Court of Iowa, in and for Monona County, he and his co-plaintiff, Otis Peterson, sought temporary and permanent writs of injunction against various named and described persons who had come upon the land with respect to which said persons are tenants and who have interfered with the lawful possession of this defendant and the said Otis Peterson. Temporary injunctions have been granted by that court against the named and described defendants in that action.
11. He denies the allegations of paragraph 11 of said Claim.
12. He denies the allegations of paragraph 12 of said Claim.

COUNTERCLAIM FOR INJUNCTION

13. He incorporates herein the allegations of paragraph 5 of his answer to Claim I of the plaintiff.

14. He incorporates herein by reference paragraphs 9 and 10 of his answer to Claim II of plaintiff.

15. He is entitled to injunctive relief from this court to maintain his lawful possession of the land of which he is the tenant and to prevent plaintiff and all other persons from interfering with his right to possession of that land.

WHEREFORE, defendant, Harold Jackson, prays that the court dismiss plaintiff's complaint at plaintiff's costs and that the court enter preliminary and permanent injunctions against plaintiff and all other persons (except defendants, their agents, employees and successors in interest) from interfering with the right to possession of the land described above of which this defendant is the lawful tenant. Said defendant prays for all such other and further general equitable relief as shall be deemed just by the court in the premises.

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Attorneys for Defendant, Harold Jackson

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, CHARLES G. LAKIN,
FLORENCE LAKIN, R.G.P., INCORPORATED, an
Iowa Corporation, HAROLD JACKSON, OTIS PETER-
SON, TRAVELERS INSURANCE COMPANY and the
STATE OF IOWA,

Defendants.

ANSWER OF DEFENDANTS ROY TIBBALS
WILSON, CHARLES E. LAKIN, AND
FLORENCE LAKIN

For answer to Claim I of plaintiff's complaint the defendants, Roy Tibbals Wilson, Charles E. Lakin, described as Charles G. Lakin in the caption of plaintiff's complaint, but whose true and correct name is Charles E. Lakin, and Florence Lakin, admit, deny and allege as follows:

1. Admit the allegations of paragraph 1 of said complaint.

2. Deny that the plaintiff owns all or any of the land described in paragraph 2 of said complaint. Admit that in 1867, when the T. H. Barrett Survey was made, land described as in paragraph 2 of said complaint (but of course without reference to the 1943 Iowa-Nebraska Compact Line or to the east or left bank of the Missouri River) existed, not in Monona County, Iowa, but within the borders of the state of Nebraska on the right or Ne-

braska bank of the Missouri River. Said land, between the years 1867 and 1943, was eroded away by the action of the Missouri River and ceased to exist at the described location, having been washed down the river. New land was created between the years 1867 and 1943 by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described in paragraph 2 of plaintiff's complaint. Said accretion land, upon coming into existence, became the property of the riparian owners on the Iowa bank of the Missouri River to whose land it had accreted. By mesne conveyances from said riparian owners or from persons who obtained title from or against them, the defendants, Roy Tibbals Wilson and Charles E. Lakin, became and are now the owners in fee simple of the portions of said accretion land which fall within the borders of tracts of land owned by them and appropriately described by Iowa section, township and range numbers as follows:

Roy Tibbals Wilson is the owner in fee simple of the following described land situated in Monona County, Iowa:

(Description of land omitted in printing.)

Roy Tibbals Wilson leased the above land to the defendant, Harold Jackson, under written lease dated August 15, 1974 for a term of one year from March 1, 1975 to February 28, 1976, and Jackson is entitled to possession of said land under said lease.

Charles E. Lakin is the owner of the following described land which is situated in Monona County, Iowa:

(Land description omitted in printing.)

3. Admit that the lands described in paragraph 2 of plaintiff's complaint were in 1867 a part of the Omaha Indian Reservation to which the United States held title for the use and benefit of the Omaha Tribe of Indians. However, said title was extinguished when said land ceased to exist when it was eroded away and washed down the river, and these answering defendants deny the allegations of paragraph 3 of plaintiff's complaint.

4. Deny the allegations of paragraph 4 of plaintiff's complaint. The defendants, Roy Tibbals Wilson and Charles E. Lakin, and those through whom they derived title, have, personally and by their tenants, been in possession of their respective lands described in paragraph 2 of this answer for more than thirty years last past, subject only to a brief invasion by members of the Omaha Tribe of Indians in the spring of 1973 which was terminated pursuant to a court order, and a second invasion commencing on April 2, 1975, which invasions have been resisted by the said defendants to the best of their ability. During the above described period of thirty years or more the tillable land included in the tracts described in paragraph 2 hereof has been cleared and rendered productive by these answering defendants and their predecessors in title. The defendant, Harold Jackson, as tenant of the Wilson land, is entitled to possession thereof and has been and is in possession thereof subject only to the interference with his possession by certain members of the Omaha Tribe of Indians commencing April 2, 1975.

5. For answer to paragraph 5 of plaintiff's complaint the defendants, Roy Tibbals Wilson and Charles

E. Lakin, admit that they claim title to the lands as alleged in paragraph 2 hereof, and allege that their titles and ownership are lawful and valid and that the claims of the plaintiff are null and void and of no effect.

6. These answering defendants deny that the plaintiff is entitled to any judgment as asserted in paragraph 6 of plaintiff's complaint, and allege that the defendant Charles E. Lakin is entitled to a judgment quieting title in fee simple in him to the land described in paragraph 2 hereof as owned by him, and upholding his right to possession thereof as against the claims of the plaintiff and the Omaha Tribe of Indians; and that the defendant Roy Tibbals Wilson is entitled to a judgment quieting title in fee simple in him to the land described in paragraph 2 hereof as owned by him, and upholding his right to possession thereof as against the claims of the plaintiff and of the Omaha Tribe of Indians, but subject to the rights of the defendant, Harold Jackson, under his lease above described. The defendants Roy Tibbals Wilson and Charles E. Lakin are entitled to an order declaring that the United States and the Omaha Tribe of Indians have no right, title or interest in or to the lands described in paragraph 2 hereof, and no right to possession thereof.

7. Deny the allegations of paragraph 7 of plaintiff's complaint. The defendants, Roy Tibbals Wilson and Charles E. Lakin and each of them will suffer irreparable injury unless judgment is entered by this Court upholding their title and right to possession of the lands described in paragraph 2 hereof.

8. As an additional and separate defense these answering defendants allege that the defendants Roy Tibbals Wilson and Charles E. Lakin and their predecessors in title have been in open adverse possession of the lands described in paragraph 2 hereof under color of title for more than thirty years prior to the filing of the complaint in this action by plaintiff; that prior to the filing of said complaint the plaintiff had not contested the ownership and possession of said land by said defendants and their predecessors in title but had acquiesced in the same; that plaintiff by its Geological Survey, a part of its Department of the Interior of which the Bureau of Indian Affairs is also a part, in 1966 published a map of the area involved showing on said map the eastern boundary of the Omaha Indian Reservation as being the Missouri River as it existed in 1965; that relying on the foregoing acquiescence and representations of the plaintiff the said defendants and their predecessors in title purchased said land from the apparent owners thereof, cleared it of trees and otherwise prepared it for cultivation, installed irrigation equipment, dug drainage ditches, and paid taxes on said land, all involving great expense to these defendants and their predecessors in title. Also, witnesses who had knowledge of the action of the Missouri River in the vicinity of the land described in paragraph 2 of plaintiff's complaint and in paragraph 2 of this answer, and of what effect such action had with respect to said land, have died and, due to the delay by the plaintiff in asserting its claim, said witnesses are unavailable to testify. By reason of the foregoing these defendants will be greatly prejudiced if the plaintiff is permitted to assert its claim effectively at this time, and

the plaintiff by reason of its laches is estopped from claiming or asserting any title it might otherwise have in said tracts described in paragraph 2 hereof or in any part thereof.

ANSWER TO CLAIM II

For answer to plaintiff's Claim II these answering defendants deny, admit, and allege as follows:

9. Adopt and incorporate their answers heretofore made to paragraphs 1 through 7 of plaintiff's complaint.

10. Admit the allegations of paragraph 9.

11. Deny that the purpose and effect of the petition in equity no. 18965 is to challenge the title and possession of the United States and of the Omaha Tribe of Nebraska to those lands claimed by Jackson and Peterson, and deny that the United States is an indispensable party to equity no. 18965. Admit the other allegations of paragraph 10 of plaintiff's complaint.

12. Deny the allegations of paragraph 11 of plaintiff's complaint.

13. Deny the allegations of paragraph 12 of plaintiff's complaint.

COUNTER-CLAIM

For their counter-claim against the plaintiff the defendants Roy Tibbals Wilson and Charles E. Lakin and Florence Lakin, allege as follows:

14. This court has jurisdiction over this counter-claim by reason of Rule 13 (a) of the Federal Rules of Civil Procedure.

15. These answering defendants adopt and incorporate herein by this reference the allegations in their foregoing answer to plaintiff's complaint. They further adopt and incorporate herein by this reference their "Resistance to Motion Of Plaintiff For Preliminary Injunction", and their "Motion For Preliminary Injunction By Defendants Roy Tibbals Wilson, et al." and renew the prayers thereof.

WHEREFORE, these answering defendants pray that judgment be entered as follows:

(a) Denying the preliminary injunction prayed for by plaintiff and granting these answering defendants a preliminary injunction enjoining plaintiff, the Omaha Tribe of Indians, their agents, employees, members and all other persons acting under their direction, from interfering with the possession of the lands described in paragraph 2 hereof by these defendants and Harold Jackson, the tenant of the defendant Roy Tibbals Wilson, until the rights of the parties to this action have been determined by this Court.

(b) For a judgment quieting the title to the land described in paragraph 2 hereof in the defendants Roy Tibbals Wilson and Charles E. Lakin as their interests are there set forth in fee simple; declaring that the plaintiff, and the Omaha Tribe of Indians and its members have no right, title or interest in said described land, or any part thereof; and enjoining the plaintiff, said tribe and its members, from asserting title to such lands and from interfering in any way with the possession, use and occu-

pancy of said lands by defendants Roy Tibbals Wilson and Charles E. Lakin, and their lessees and assigns.

(c) For such other relief as the Court may find justified and for the costs of this action.

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*Attorneys for Defendants Roy Tibbals
Wilson, Charles E. Lakin, Florence
Lakin*

(Proof of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA,
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANT
RGP, INCORPORATED, AN IOWA CORPORATION

For answer to Claim I of Plaintiff's Complaint, the
Defendant RGP, Incorporated, an Iowa Corporation,
states:

1. It admits the allegations of paragraph 1 of said
Complaint.

2. It denies that the Plaintiff owns all or any of the
land described in Paragraph 2 of said Complaint, but
admits that in 1867 when the T. H. Barrett Survey was
made, the land described as in Paragraph 2 of said Com-
plaint (but, of course, without reference to the 1943 Iowa-
Nebraska Compact Line or to the east or left bank of the
Missouri River) existed, not in Monona County, Iowa,
but within the borders of the State of Nebraska on the
right or Nebraska bank of the Missouri River. It af-
firmatively alleges that said land, between the years 1867
and 1943, was eroded and washed away by the action of
the Missouri River as it moved in a westerly course and
said land therefore ceased to exist at the described loca-
tion, having been washed down the river. Between the

years 1867 and 1943, new land was created by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described in Paragraph 2 of Plaintiff's Complaint. Said accretion land, upon coming into existence, became the property of the riparian owners on the Iowa bank of the Missouri River to whose land it had accreted. By mesne conveyances from said riparian owners or from persons who obtained title from or against them, the Defendant RGP, Incorporated, an Iowa Corporation, became and is now the owner in fee simple of portions of said accretion land which fall within the borders of the tracts of land owned by them and appropriately described by Iowa Section, Township and Range numbers as follows:

RGP, Incorporated, an Iowa Corporation, is the owner in fee simple of the following described land situated in Monona County, Iowa.

RGP, Incorporated, an Iowa Corporation, is the successor in title to the above described lands from Raymond G. Peterson, now deceased. Raymond G. Peterson leased the above land to the Defendant, Otis Peterson, under written lease dated March 1, 1957 for a term of 10 years, which lease was then extended by an Extension Agreement dated January 28, 1967 for an additional 10 years or until March 1, 1977, and Otis Peterson is entitled to possession of said land under said lease.

(Land description omitted in printing.)

3. It admits that the lands described in Paragraph 2 of the Plaintiff's Complaint were in 1867 a part of the Omaha Indian Reservation to which the United States held title for the use and benefit of the Omaha Tribe of

Indians. However, it affirmatively alleges that said title was extinguished when said land ceased to exist when it was eroded away and washed down the river and this answering Defendant denies the allegations of Paragraph 3 of Plaintiff's Complaint.

4. It denies the allegations of Paragraph 4 of Plaintiff's Complaint. This Defendant, and those through whom it derived title, have, personally and by their tenants, been in possession of their respective lands described in Paragraph 2 of this Answer for more than 30 years, subject only to a brief invasion by members of the Omaha Tribe of Indians in the Spring of 1973, which was terminated by a Court Order, and a second invasion commencing on April 2, 1975, which invasions have been resisted by this Defendant to the best of its ability. During the above described period of 30 years or more, the tillable land included in the tracts described in Paragraph 2 hereof has been cleared and rendered productive by this answering Defendant and its predecessors in title. The Defendant, Otis Peterson, as tenant of the RGP land, is entitled to possession thereof and has been in possession thereof subject only to the interference with his possession by certain members of the Omaha Tribe of Indians commencing April 2, 1975.

5. For Answer to Paragraph 5 of Plaintiff's Complaint, this Defendant admits that it claims title to the lands as alleged in Paragraph 2 hereof and alleges that its title and ownership are lawful and valid and that the claims of the Plaintiff are null and void and of no effect.

6. This answering Defendant denies that the Plaintiff is entitled to any judgment as asserted in Paragraph 6 of Plaintiff's Complaint and affirmatively alleges that

the Defendant RGP, Incorporated, an Iowa Corporation, is entitled to a judgment quieting title in fee simple in it to the land described in Paragraph 2 hereof as owned by it and upholding its right to possession thereof as against the claims of the Plaintiff and of the Omaha Tribe of Indians, but subject to the rights of the Defendant, Otis Peterson, under his lease above described. This Defendant is entitled to an Order declaring that the United States and the Omaha Tribe of Indians have no right, title or interest in or to the lands described in Paragraph 2 hereof and no right to the possession thereof.

7. This Defendant denies the allegations of Paragraph 7 of Plaintiff's Complaint and affirmatively alleges that it will suffer irreparable injury unless judgment is entered by this Court upholding its title and right to possession of the lands described in Paragraph 2 hereof.

8. As a separate and additional defense, this answering Defendant alleges that RGP, Incorporated, an Iowa Corporation, and its predecessors in title have been in open adverse possession of the lands described in Paragraph 2 hereof under color of title for more than 30 years prior to the filing of the Complaint in this action by the Plaintiff; that prior to the filing of said Complaint, the Plaintiff has not contested the ownership and possession of said land by said Defendant and their predecessors in title, but have acquiesced in the same; that the Plaintiff by its geological survey, a part of its Department of the Interior of which the Bureau of Indian Affairs is also a part, in 1966 established a map of the area involved showing on said map the eastern boundary of the Omaha Indian Reservation as being the Missouri River as it existed in 1965; that relying on the

foregoing acquiescence and representations of the Plaintiffs, this Defendant and its predecessors in title have cleared the land of trees and otherwise prepared it for cultivation, installed irrigation equipment, dug drainage ditches and paid taxes on said land, all involving great expense to this Defendant and its predecessor in title. Also, witnesses who had knowledge of the action of the Missouri River in the vicinity of the land described in Paragraph 2 of Plaintiff's Complaint and in Paragraph 2 of this Answer, and of what effect such action had with respect to said land, have died, and due to the delay by the Plaintiff in asserting its claim, said witnesses are unavailable to testify. By reason of the foregoing, this Defendant will be greatly prejudiced if the Plaintiff is permitted to assert its claim effectively at this time, and the Plaintiff by reason of its laches, is estopped from claiming or asserting any title it might otherwise have in said tracts described in Paragraph 2 hereof or in any part hereof.

ANSWER TO CLAIM II

For Answer to Plaintiff's Claim II, this answering Defendant states:

9. It adopts and incorporates its Answers heretofore made to Paragraphs 1 through 7 of Plaintiff's Complaint.

10. It admits Paragraph 9 of said Complaint.

11. It denies that the purpose and effect of the Petition in Equity No. 18965 is to challenge the title and possession of the United States and of the Omaha Tribe of Nebraska to those lands claimed by Jackson and Peterson, and denies that the United States is an indis-

pensable party to Equity No. 18965. It admits the other allegations of Paragraph 10 of Plaintiff's Complaint.

12. It denies the allegations of Paragraphs 11 and 12 of Plaintiff's Complaint.

COUNTERCLAIM

For its Counterclaim against the Plaintiff, the Defendant RGP, Incorporated, an Iowa Corporation, alleges as follows:

13. This Court has jurisdiction over this Counterclaim by reason of Rule 13 (a) of the Federal Rules of Civil Procedure.

14. This answering Defendant adopts and incorporates herein by this reference the allegations in their foregoing Answer to Plaintiff's Complaint. It further adopts and incorporates herein by this reference its "Resistance to Motion of Plaintiff for Preliminary Injunction", and its "Motion for Preliminary Injunction by Defendants Roy Tibbals Wilson, et al." and renews the prayer thereof.

WHEREFORE, this answering Defendant prays that judgment be entered as follows:

- (a) Denying the Preliminary Injunction prayed for by Plaintiff and granting this answering Defendant a Preliminary Injunction enjoining Plaintiff, the Omaha Tribe of Indians, their agents, employees, members and all other persons acting under their direction, from interfering with the possession of the lands described in Paragraph 2 hereof by this Defendant and Otis Peterson, the tenant of this Defendant, until the rights of the parties to this action have been determined by this Court.

- (b) For a judgment quieting title to the land described in Paragraph 2 hereof in the Defendant RGP, Incorporated, an Iowa Corporation, in fee simple; declaring that the Plaintiff, and the Omaha Tribe of Indians and its members have no right, title or interest in said land, or any part thereof; and enjoining the Plaintiff, said Tribe, and its members from asserting title to such lands and from interfering in any way with the possession, use and occupancy of said lands by this Defendant and its lessees and assigns.
- (c) For such relief as the Court may find justified and for the costs of this action.

PETERS, CAMPBELL
AND PEARSON

By /s/ Peter J. Peters

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*Attorneys for Defendant RGP,
Incorporated, An Iowa Corporation*

(Proof of service omitted in printing.)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, CHARLES G. LAKIN,
FLORENCE LAKIN, R.G.P., INCORPORATED, an
Iowa Corporation, HAROLD JACKSON, OTIS PETER-
SON, TRAVELERS INSURANCE COMPANY and the
STATE OF IOWA,

Defendants.

ANSWER OF DEFENDANT STATE OF IOWA

DIVISION I

For answer to claim I of plaintiff's complaint the defendant, State of Iowa, admits, denies, and alleges as follows:

1. Defendant admits the allegation contained in paragraph 1 of plaintiff's complaint.
2. Defendant denies each and every allegation contained in paragraph 2 of plaintiff's complaint.
3. Defendant denies each and every allegation contained in paragraph 3 of plaintiff's complaint.
4. Defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of plaintiff's complaint and such allegations are therefore denied.
5. Defendant denies each and every allegation contained in paragraph 5 of plaintiff's complaint except that

defendant admits that she claims title to part of the lands described in paragraph 2 of plaintiff's complaint as alleged in paragraph 5 of plaintiff's complaint and alleges that plaintiff's claims to title and ownership of the state's lands described in paragraph 2 of plaintiff's complaint are null and void and of no effect.

6. Defendant denies each and every allegation contained in paragraph 6 of plaintiff's complaint.

7. Defendant denies each and every allegation contained in paragraph 7 of plaintiff's complaint.

DIVISION II

For answer to plaintiff's claim II this answering defendant denies, admits and alleges as follows:

8. Defendant adopts and incorporates her answers heretofore made to paragraphs 1 through 7 of plaintiff's complaint.

9. Defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of plaintiff's complaint in that defendant never received a copy of court record Equity No. 18965 and such allegations are therefore denied.

10. Defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of plaintiff's complaint in that the defendant never received a copy of court record Equity No. 18965 and such allegations are therefore denied.

11. Defendant denies each and every allegation contained in paragraph 11 of plaintiff's complaint.

12. Defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of plaintiff's complaint in that defendant never received a copy of court record Equity No. 18965 and such allegations are therefore denied.

DIVISION III

13. Further answering, defendant avers that the State of Iowa is a sovereign state of the United States of America, admitted thereto in 1846 under 9 Stat. L. 117.

14. Further answering, defendant avers that the lands described in paragraph 2 of plaintiff's complaint are part of the State of Iowa and that part of said lands are owned by Iowa as sovereign and said description is attached as Exhibit A and hereby made a part hereof.

15. Further answering, defendant avers that the State of Iowa owns the bed of the Missouri River between the thalweg and the ordinary high water mark on the easterly side of said river, and any islands growing up out of that portion of said riverbed and any abandoned channel of that portion of said river.

16. Further answering, defendant avers that the portion of land described by paragraph 2 of plaintiff's complaint which is owned by the State of Iowa and described above is such an island and such abandoned river channel lying on the easterly side of the thalweg of the Missouri River and on the easterly side of the compact line entered into between Iowa and Nebraska in 1942 and approved by Congress in 1943, 57 Stat. L. 495.

17. Further answering, defendant avers that the western boundary of the State of Iowa was established by Congress in 1943 and her rights and the rights of all others including the United States are fixed thereby.

18. Further answering, defendant avers that the United States may not by this action seek to abrogate that act of Congress.

DIVISION IV

19. Further answering, defendant avers that the changing of the channel and degradation of the Missouri River which resulted in Ivy Island being no longer in the river and the rest of Iowa's land becoming abandoned river channel were both caused by the plaintiff thereby estopping plaintiff from claiming such land under an avulsion theory.

20. Further answering, defendant avers that plaintiff should not benefit from its action in moving the channel and causing its degradation.

DIVISION V

21. Further answering, defendant avers that the State of Iowa has right and title in some of the lands described in paragraph 2 of plaintiff's complaint and more specifically described in Exhibit A attached hereto by reason of quit claim deeds executed to defendant State of Iowa and filed and recorded in the Office of the Monona County Recorder on May 25, 1965, Book 77 Land Deeds page 233, and May 25, 1965, Book 77 Land Deeds page 238.

22. Further answering, defendant avers that title to any part of said lands described in paragraph 2 of plaintiff's complaint or more precisely described in this answer which were a part of the Omaha Indian Reservation was extinguished when said land eroded away, ceased to exist, and washed down the Missouri River and defendant avers that her land was newly created on the easterly side of said river by accretion, island building and degradation of the bed of the river.

DIVISION VI COUNTER-CLAIM

For a counter-claim against the plaintiff the defendant State of Iowa alleges as follows:

23. This court has jurisdiction over this counter-claim by reason of Rule 13 (a) of the Federal Rules of Civil Procedure.

24. The defendant State of Iowa adopts by reference its answers in paragraphs 1 through 22, above, as if fully set forth.

25. An accurate legal description of the land owned by the State of Iowa is annexed hereto and marked Exhibit "A".

WHEREFORE, the defendant State of Iowa prays that judgment be entered quieting title to the land described in Exhibit "A", annexed hereto, in the defendant State of Iowa in fee simple, declaring that plaintiff, and the Omaha Indian Tribe and its members have no right, title or interest in said described land, or any part thereof; enjoining the plaintiff, said tribe and its members

from asserting title to such lands and from interfering in any way with the possession, use and occupancy of said lands by the defendant State of Iowa, dismissing plaintiff's complaint at plaintiff's costs, and granting such other and further relief as to the Court may seem just.

RICHARD C. TURNER
Attorney General of Iowa

CLIFFORD E. PETERSON
JAMES C. DAVIS
Assistant Attorneys General

/s/ Bennett Cullison, Jr.

P. O. Box 68
Harlan, Iowa 51537
Telephone: (712) 755-2192

Attorneys for Defendant State of Iowa

(Certificate of service and description of land omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil No. C-75-4024

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ROY TIBBALS WILSON, et al.,
Defendants.

PLAINTIFF'S REPLY TO COUNTERCLAIM OF DEFENDANTS ROY TIBBALS WILSON, CHARLES E. LAKIN AND FLORENCE LAKIN

In response to the counterclaim found in paragraphs 14 and 15 of defendants' answer, plaintiff states:

1. This court lacks jurisdiction to quiet title, in favor of defendants, to lands held in trust for Indians by the United States, 28 U. S. C. 2409a (Supp. III); F. R. Civ. P. 13 (d).

2. Plaintiff adopts each and every allegation contained in the complaint and denies any of defendants' allegations inconsistent therewith.

WHEREFORE, plaintiff prays that defendants' counterclaim be dismissed.

/s/ Evan L. Hultman
United States Attorney

/s/ Robert L. Sikma
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil No. C-75-4024

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ROY TIBBALS WILSON, et al.,
Defendants.

PLAINTIFF'S REPLY TO COUNTERCLAIM OF DEFENDANT RGP, INC.

In response to the counterclaim found in paragraphs 13 and 14 of defendant's answer, plaintiff states:

1. This court lacks jurisdiction to quiet title, in favor of defendant, to lands held in trust for Indians by the United States. 28 U. S. C. 2409a (Supp. III); F. R. Civ. P. 13 (d).

2. Plaintiff adopts each and every allegation contained in the complaint and denies any of defendant's allegations inconsistent therewith.

WHEREFORE, plaintiff prays that defendant's counterclaim be dismissed.

/s/ Evan L. Hultman
United States Attorney

/s/ Robert L. Sikma
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil No. C-75-4024

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ROY TIBBALS WILSON, et al.,
Defendants.

ANSWER TO STATE OF IOWA'S COUNTERCLAIM

Now comes the United States of America, by and through its attorney, and answers the counterclaim of the State of Iowa, which is contained in its amendment to the State's answer, as follows:

23. Admit.

24. Plaintiff admits that the State of Iowa adopts by reference its answers contained in paragraphs 1 through 22 of the answer. Plaintiff denies the allegations contained in paragraphs 14 and 15 of the answer, admits the allegation in paragraph 16 that some of the lands claimed by the State of Iowa are in an abandoned river channel lying east of the easterly side of the present thalweg of the current Missouri River and east of the 1943 compact line, but denies all other allegations contained therein. Plaintiff admits the allegation contained in paragraph 17 of the answer insofar as it states that the boundary of the State of Iowa was fixed in 1943, but denies any implication that the title to the lands involved

in this litigation was thereby affected. Plaintiff also denies the legal conclusion in paragraph 19 of the answer which states that plaintiff is estopped from asserting its claim. Plaintiff also denies the allegations contained in paragraphs 21 and 22 of the answer.

25. Plaintiff denies that the State of Iowa owns the land described in the State's Exhibit A.

Respectfully submitted,

/s/ James J. Clear
Attorney

Department of Justice
Washington, D. C. 20530
Telephone: (202) 739-2445

Attorney for Plaintiff
United States of America

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil No. C-75-4024

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ROY TIBBALS WILSON, et al.,
Defendants.

PLAINTIFF'S REPLY TO COUNTERCLAIM
OF DEFENDANT OTIS PETERSON

(Filed August 12, 1975)

In response to the counterclaim contained in paragraphs 13-15 of defendant's answer, plaintiff states:

1. This court is without jurisdiction to grant defendant a possessory interest in lands held in trust for Indians by the United States. 28 U.S.C. 2409a (Supp. III); F. R. Civ. P. 13 (d).

2. Plaintiff admits that defendant, as alleged in paragraph 5 of his answer to Claim I, which is incorporated by reference into paragraph 13 of his counterclaim, has a lease with RGP, Inc., but denies that RGP, Inc., is the owner of the leased land or has any authority to lease said lands.

3. Plaintiff admits the allegations, contained in paragraphs 9 and 10 of defendant's answer to Claim II, and incorporated by reference into paragraph 14 of the counterclaim, except insofar as they allege that defendant and Harold Jackson were in lawful possession.

4. Plaintiff adopts each and every allegation contained in the Complaint and denies any of defendant's allegations inconsistent therewith.

WHEREFORE, plaintiff prays that the counterclaim be dismissed.

/s/ Evan L. Hultman
United States Attorney

/s/ Robert L. Sikma
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil No. C-75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants.

PLAINTIFF'S REPLY TO COUNTERCLAIM
OF DEFENDANT HAROLD JACKSON

(Filed August 12, 1975)

In response to the counterclaim contained in paragraphs 13-15 of defendant's answer, plaintiff states:

1. This court is without jurisdiction to grant defendant a possessory interest in lands held in trust for Indians by the United States. 28 U.S.C. 2409a (Supp. III); F. R. Civ. P. 13 (d).

2. Plaintiff admits the allegation, contained in paragraph 5 of defendant's answer to Claim I and incorporated by reference into paragraph 13 of the counterclaim, that defendant has a lease with Roy Tibbals Wilson but denies that Roy Tibbals Wilson is the owner of the lands so leased or that he has any authority to lease said lands.

3. Plaintiff admits the allegations, contained in paragraphs 9 and 10 of defendant's answer to Claim II and incorporated by reference into paragraph 14 of the counterclaim, except insofar as they allege that the defendant and Otis Peterson were in lawful possession of the land in dispute.

4. Plaintiff adopts each and every allegation contained in the complaint and denies any of defendant's allegations inconsistent therewith.

WHEREFORE, plaintiff prays that defendant's counterclaim be dismissed.

/s/ Evan L. Hultman
United States Attorney

/s/ Robert L. Sikma
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4026

OMAHA INDIAN TRIBE, organized Indian Tribe pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended,

Plaintiff,

vs.

HAROLD JACKSON and OTIS PETERSON, and the DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Defendants.

COMPLAINT FOR INJUNCTION, FOR A STAY
OF STATE COURT PROCEEDINGS
AND OTHER RELIEF

(Filed May 20, 1975)

COMES NOW the Omaha Indian Tribe, organized under a constitution and by-laws ratified by the Tribe on February 15, 1936, and approved by the Secretary of the

Interior, trustee for the Omaha Indian Tribe, on March 30, 1936, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), and hereby alleges, avers and complains that:

1. The United States is holder of the lands involved herein, in trust for the Omaha Tribe of Nebraska, and this Court has jurisdiction under 28 U.S.C. 1345 (see attached Brief).

This Court also has jurisdiction under Title 28, Section 2283, United States Code, as the relief sought, in part, is a stay of the State Court proceedings outlined herein. Further, the cause herein involves the Omaha Tribe of Nebraska and certain Iowa defendants; that the value of the lands involved exceeds \$10,000.00, and jurisdiction is further present by reason of Title 28, Section 1332.

2. This action is being filed at this time after a proper resolution has been passed by the Tribal Council and after due and careful consideration by said body.

3. The above-named defendants Harold Jackson and Otis Peterson, without any clear right or title, assert that they will proceed by trespass, if they have not already done so, or if they are not restrained by the Court, upon the lands of the Omaha Indian Tribe, which lands are now and have always been part of the Omaha Indians Reservation, created pursuant to the Treaty of March 16, 1854 (10 Stat. 1043), all as surveyed by the General Land Office of the Department of the Interior in the years 1867-68, said survey being the only official survey of said land. Those lands are now and have always been

held in trust for the Omaha Indian Tribe by the United States of America, which lands are now and have been held by the Omaha Indian Tribe pursuant to the direction, assistance and cooperation of the Bureau of Indian Affairs, Department of Interior, United States of America, in peaceful, actual and constructive possession of said lands, they having been fully posted and notice given that those lands are now and have been part of the Omaha Indian Reservation, and that any trespass upon those lands is a clear violation of the criminal statutes of the United States of America; attached hereto and made a part hereof is a plat and legal description of the lands in question, said plat and description being marked Exhibit "A" and made a part of this complaint by reference, the lands being hereafter referred to as the Blackbird Bend Area of the Omaha Indian Reservation.

4. The above-named defendants, Harold Jackson and Otis Peterson, by their threats to trespass upon the Blackbird Bend Area of the Omaha Indian Reservation, which are held in trust for the Omaha Indian Tribe by the United States of America, threaten to cause and will cause immediate, irreparable damage to the Omaha Indian Tribe if the aforesaid defendants, Harold Jackson and Otis Peterson, carry out their threat to trespass on these lands, and that their threat to trespass places in jeopardy the lives and property of the Omaha Indian Tribe, who are now and have been, all as averred above, in peaceful occupation of the land with the full cooperation and protection of the aforesaid agents of the United States of America, the Commissioner of Indian Affairs, and his staff. There is attached hereto and made a part hereof a Memorandum of Law dated February 3, 1975, from the

principal law office of the Department of the Interior, the Honorable Kent Frizzell, who has set forth in that Solicitor's Opinion as chief law officer of the Department of Interior, and declared, among other things, as follows:

"I have concluded for the reasons that follow that the Bureau's position is legally correct and that the lands in question have been a part of the Omaha Indian Reservation since 1854, owned in trust for the Tribe by the United States."

A copy of the aforesaid opinion by the Solicitor, Kent Frizzell, Chief Legal Officer of the Department of Interior, is attached hereto and made a part of this complaint and marked Exhibit "B".

5. The above-named defendants, Harold Jackson and Otis Peterson, filed an action in the District Court of Iowa in and for Monona County in furtherance of their trespass and threatened trespass upon the land of the Omaha Indian Tribe, and to threaten the peaceful occupancy and possession of the Omaha Indian Tribe and the civil rights of each of the members of that Tribe did obtain an order dated May 15, 1975, from the aforesaid District Court of Iowa in and for Monona County purporting to restrain the following individually-named persons, not the Omaha Indian Tribe nor the United States of America, trustee, said individually-named persons being Edward L. Cline, Dan Webster, Bruce Marr, William Webster, Joe Fremont and Louis Webster, Jr., from entering upon certain lands and interfering with the farming of those lands by the above-named defendants, and further, did on May 16, 1975 obtain a supplemental order, Ex. C., purporting to restrain all persons from entering on said lands, said lands being described in the aforesaid order

dated May 15, 1975, and are not the same lands comprising the Blackbird Bend Area of the Omaha Indian Reservation, all as described in the attached plat and description, Exhibit "A", of this complaint, but rather are lands described by an illegal and unauthorized survey made in clear violation of the criminal laws of the United States of America, particularly 25 U. S. C. 180.

6. Neither the order of May 15, 1975 nor the one of May 16, 1975 are directed to nor do they in any way pertain to the Omaha Indian Tribe nor to the United States of America, trustee for the Omaha Indian Tribe, nor do they relate exactly to the Blackbird Bend Area of the Omaha Indian Reservation, and are therefore null and void and of no force and effect by reason of the want of jurisdiction in the aforesaid District Court of Iowa in and for Monona County over either the Omaha Indian Tribe or the United States of America over the lands comprising the Blackbird Bend Area of the Omaha Indian Reservation. The aforesaid Omaha Indian Tribe and the United States of America, trustee, are indispensable parties to any action involving the Blackbird Bend Area of the Omaha Indian Reservation, and therefore, the above-mentioned orders, as averred above, are null and void and of no force and effect, and the entry upon the Blackbird Bend Area, as threatened by the above-named defendants, Harold Jackson and Otis Peterson, pursuant to the aforesaid null and void order of May 15, 1975, or the order of May 16, 1975, would constitute a trespass upon those lands in clear violation of the rights of the Omaha Tribe and the criminal statutes of the United States of America, trustee for the Omaha Indian Tribe.

7. That the United States of America has filed a quiet title action in this Court, No. C-75-4024, asking for injunctive relief and the quieting of title; it is the strong belief of the Omaha Tribe of Nebraska, as set out in the Resolutions and Affidavit attached hereto, Ex. D, that said action is untimely and is in effect a conduit to permit and allow the defendants to retake possession of the lands involved during the extended period involved in a quiet title action; said quiet title action was filed over the protests of the Omaha Tribe of Nebraska and should not be entertained in any other light by this Court. The Tribe is now in possession and should be permitted to retain said possession, as the lands are clearly theirs.

8. That this plaintiff will be irreparably damaged if the Stay is not issued and if the injunction is not permitted by this Court.

WHEREFORE, the plaintiff prays for:

1. A stay of the injunction and the supplemental injunction issued in the District Court of Iowa in and for Monona County under Title 28, Section 2283, United States Code, restraining the Court, Monona County officials and the defendants herein or any other parties from enforcing or attempting to enforce said injunction.

2. For a preliminary injunction maintaining the Omaha Tribe in possession of the lands involved herein until the rights of the parties can be determined by this Court.

3. For a permanent injunction maintaining the Omaha Tribe of Nebraska in possession of their rightful lands.

4. For relief of this plaintiff of any *ex parte* rulings or orders that it does not support in cause No. C-75-4024 now pending in this Court.

5. An order of this Court setting a hearing and providing for notice to the defendants of said hearing.

6. For such other relief as the Court may find justified.

O'BRIEN & O'BRIEN

By /s/ John T. O'Brien

916 Grandview Boulevard

Sioux City, Iowa 51101

Ph. (712) 255-0147

Attorneys for Plaintiff

EXHIBIT B (Exhibit A omitted in printing.)

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Solicitor
Washington, D. C. 20240

SEAL

In Reply Refer To:

February 3, 1975

Memorandum

To: Commissioner of Indian Affairs

From: Solicitor Kent Frizzell

Subject: Proposed Secretarial Boundary, Blackbird Bend Area, Omaha Indian Reservation, Iowa and Nebraska

By memorandum of October 15, 1974, the Acting Deputy Commissioner asked this Office to review a proposed Secretarial proclamation concerning part of the eastern boundary of the Omaha Indian Reservation and the own-

ership of approximately 3,190 acres of land, presently located within the States of Iowa and Nebraska.

The Bureau had concluded as a matter of policy that the proclamation should be issued, recognizing that the land in question is, and has been since 1854, within the boundaries of the Omaha Indian Reservation, owned by the United States in trust for the Omaha Tribe.

I have concluded, for the reasons that follow, that the Bureau's position is legally correct, and that the lands in question have been a part of the Omaha Indian Reservation since 1854, owned in trust for the Tribe by the United States. Rather than proceeding by Secretarial proclamation, I recommend that we request the Department of Justice to file appropriate legal actions quieting title to these lands in the United States in trust for the Tribe. If you concur, please advise me and we will proceed forthwith.

My more detailed legal analysis follows.

"Blackbird Bend" is a land area of some 3,190 acres, presently located in the States of Iowa and Nebraska. Originally, these lands were an oxbow area, all on the west bank of the Missouri River. The center line of that river forms the reservation boundary.¹ The general legal doctrine is that a riparian landowner has title to lands which gradually accrete to his property. But a sudden "avulsive" change freezes all land titles as of the time immediately before it occurs. I have reviewed the facts as investigated by the Bureau, and conclude as it did that

¹ In terms of natural fluctuations, the river has vacillated significantly since 1854, while the Blackbird Bend Area itself has remained remarkably stable.

the Blackbird Bend Area was separated from the west bank of the Missouri River by an avulsive change. Accordingly, the Tribe retains full equitable title to the lands in question.

A. Establishment of the Omaha Reservation

The United States negotiated a treaty with the Omaha Tribe on March 16, 1854, which authorized the establishment of the present Omaha Reservation. 2 Kappler, Indian Affairs, Laws and Treaties, 611-14; 10 Stat. 1043. The Omaha Tribe ceded to the United States all of its land,

. . . south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country . . . 2 Kappler, *supra*, at 611.

The remaining Omaha land north of this line was to be set aside for a reservation, subject to the approval of the Tribe. According to a letter dated May 11, 1855, from the Secretary of the Interior to the Commissioner of Indian Affairs, the Omahas rejected the proposed location of the reservation. Exercising their prerogative under the 1854 treaty, the Tribe selected the present reservation in the area of the Blackbird Hills instead. Because the actual site of the reservation had not been finalized as of the date of the 1854 treaty, no precise description of its boundaries was included in the treaty. Distinct boundaries were established though, as evidenced by the Congressional purchase in the Treaty of March 6, 1865 of the northern part of the reservation for the Winnebago Indians:

The Omaha Tribe of Indians do hereby cede, sell and convey to the United States a tract of land from

the north side of their present reservation, vis: commencing at a point on the Missouri River four miles due south from the north boundary line of said reservation, thence west ten miles, thence south four miles, thence west to the western boundary line of the reservation, then north to the northern boundary line thence east to the Missouri River, and thence south along the river to the place of beginning. 2 Kappler, *supra*, 872; 14 Stat. 667.

The first attempted official survey of the Omaha Reservation was in the spring of 1855 by Deputy Surveyor Wallace Barnum. No copy of the plat of this survey has been located. The earliest existing survey of the reservation's boundaries was completed in 1866-67. During April and May of 1866, Deputy Surveyor Theodore Barrett followed the field notes of the previous Barnum expedition. The resulting Barrett survey is the earliest official survey for the Blackbird Bend Area. Inspection of the Barrett survey clearly shows that in 1866, the Blackbird Bend oxbow was within the exterior boundary of the Omaha Reservation. There is no other survey which conflicts with the Barrett survey. The only possible conclusion is that the Blackbird Bend Area was within the original boundaries of the reservation.

B. Subsequent Events

I have concluded that no subsequent events altered the reservation boundaries or title to the land. I will discuss in order of their occurrence those events which might be thought to have had such an effect on the Omaha Reservation.

1. *Iowa and Nebraska Statehood Acts*

The general rule is that Indian property rights are unaffected by the admission into the Union of states which include reservations within their boundaries. The Supreme Court in *United States v. Winans*, 198 U.S. 371, 382 (1905), rejected the contention that "... the [treaty] rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission to the Union." Iowa was admitted into the Union in 1846, eight years before the treaty establishing the Omaha Reservation. Act of December 28, 1846, 9 Stat. 117. Iowa's constitution sets out its western-most jurisdictional boundary as the:

... middle of the main channel of the Missouri River; thence up the middle main channel, of the said Missouri River to a point opposite the middle of the main channel of the Big Sioux River . . . 1 Iowa Code Ann. 91.

The 1804 Lewis and Clark map, the 1851 official survey of the State of Iowa, and the 1875 map of Monona County, Iowa, all show the Blackbird Bend oxbow's location on the *western* bank of the Missouri River—beyond the jurisdiction of Iowa.

Nebraska became a territory shortly after the 1854 treaty, Act of May 30, 1854, 10 Stat. 277. That Act expressly preserved the treaty rights of the Indian Tribes within the territory, and reaffirmed the Federal Government's plenary power to deal with the Indians.²

2 "... Provided further, that nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights remain unextinguished by treaty between the United States and such Indians . . ." *Id.* § 1.

This act reaffirmed the Omaha Tribe's right to the Blackbird Bend Area and rebuts any suggestion that the act contained a Congressional modification of the Treaty of 1854. Similarly, the Nebraska Statehood Act lacked explicit or implicit changes in that Treaty. Act of April 19, 1864, 13 Stat. 47. Thus, while the Omaha Reservation was located within the delineated boundaries of Nebraska, its trust status as federally protected land remained unchanged. Unaffected by the statehood of either Iowa or Nebraska, the boundary of the Blackbird Bend Area, as surveyed in 1867, remained intact.

2. *The Allotment Acts*

The Allotment Act of August 7, 1882, 22 Stat. 341, carved off a portion of the western end of the Omaha Reservation and opened it up for sale and settlement. Since Blackbird Bend is located on the reservation's eastern edge, it was not affected by this cession of land. However, Section 5 of the Act did extend to Blackbird Bend by proclaiming that the remaining unceded land be allotted to individual Indians, any surplus being patented to the Omaha Tribe under a trust period of 25 years. An amendment to the Act of 1882 was enacted on March 3, 1893, 27 Stat. 612, which further reduced the amount of surplus tribal land through additional allotments. Finally, under the Act of June 25, 1910, 36 Stat. 855, the remaining surplus lands of the Omaha Tribe were authorized to be sold.

Despite the above authorizations for sales and allotments, the Blackbird Bend oxbow has primarily remained unallotted tribal land to this day. Of the few allotments that were made, the vast majority were relinquished back to the Tribe for more suitable allotments outside the oxbow.

Only a small section of the Blackbird Bend Area was ever allotted and then patented to non-Indians, and title to that land is not being disputed.³ In any event, the recent case of *Mattz v. Arnatt*, 412 U. S. 481 (1973), rejected the claim that the opening of a reservation for settlement reduced or eliminated the reservation's boundaries. Accord, *United States v. Celestine*, 215 U. S. 278 (1909).

The only permissible conclusion, therefore, is that the enumerated Allotment Acts had no effect on the title to the Blackbird Bend Area.

3. *The 1943 Boundary Compact Between Iowa and Nebraska*

The original common boundary of Iowa and Nebraska is defined by the location of the middle of the main channel of the Missouri River. Act of December 28, 1846, 9 Stat. 117; Act of April 19, 1864, 13 Stat. 47. The Compact of 1943 represented an attempt by the two states to settle their boundary disputes once and for all. The Army Corps of Engineers had drawn up plans to stabilize the Missouri River through an extensive channelization project. The Compact of 1943 designated the middle of the main channel of the proposed, rerouted Missouri River as the new boundary between the two states. Because of World War II, the Corps' project was postponed. When it was resumed in 1948, the proposed channel was redesigned—changing the location of the river from that relied upon in the 1943 Compact. Thus, the attempt to clarify

³ See generally Plate 19, "Omaha Indian Reservation Boundary Determination—Missouri River—Blackbird Bend Area", E. M. Clark and Associates, Summary Report of September 16, 1974.

the boundary in 1943 ended in the utter confusion in 1948. The two states were left with a 1943 boundary line that bore little relationship to the new location of the Missouri River. Indeed, the 1943 line has never been accurately pin-pointed. However, the Bureau's approximation of the 1943 boundary shows that the Blackbird Bend Area of the Omaha Reservation is now located in Iowa.

It is my opinion that the 1943 Compact had no effect on the Omaha Tribe's right to Blackbird Bend. Congressional assent to the Compact cannot be considered evidence of a Congressional intent to modify the boundary and proprietary rights of the 1854 treaty. The Compact Clause of the Constitution, Article I, § 10, cl. 3, was added as a check against the erosion of federal powers by the compacting states. *Virginia v. Tennessee*, 148 U. S. 503 (1893). Congressional approval of a compact merely indicates that it contains no objectionable usurpation of the powers assigned to the national government. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U. S. 421, 433 (1855). It does not serve to make the compact a law of the United States. *Henderson v. Delaware River Joint Toll Bridge Commission*, 562 Pa. 475, 66 A.2d 843; *cert. denied*, 536 U. S. 856 (1949). The 1943 Compact does not mention the Omaha Reservation or the 1854 treaty. The approval of such a compact can in no way be construed as satisfying the requirement that takings of Indian trust property must be specifically authorized by Congress. *E.g., Menominee Tribe v. United States*, 391 U. S. 404 (1968); *United States v. Santa Fe Pacific R.R.*, 314 U. S. 339 (1941). Moreover, the Compact itself provides that titles good in Nebraska will be unimpaired by the jurisdictional shift to Iowa. 1 Iowa Code Annotated 85, 89.

The only permissible conclusion is that the Omaha Treaty rights to the Blackbird Bend Area—as delineated by the 1867 survey—are as valid in Iowa as they were in Nebraska.

4. *The Rechannelization of the Missouri River*

As indicated above, the Army Corps of Engineers undertook a program in the 1940s to rechannelize the Missouri River to reduce flooding and to stabilize the location of the river. The rechannelization had the effect of cutting the Blackbird Bend oxbow off from the rest of the reservation. The oxbow became part of the eastern bank of the Missouri River for the first time. Not only had it shifted to Iowa's jurisdiction under the 1943 Compact, but geophysically, it became contiguous with the eastern bank due to the cessation of flow around the oxbow.

A central tenet of property law is that avulsive changes in the course of a river leave title to the riparian lands unaffected. *Philadelphia Co. v. Stimson*, 223 U. S. 605 (1912); *Nebraska v. Iowa*, 145 U. S. 853 (1891); *Arkansas v. Tennessee*, 246 U. S. 158 (1917). The court in *Philadelphia Co.* stated:

It is when the change in the stream is sudden or violent, and visible, that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. *Id.*, at 624.

This test for avulsion has been applied to man-made, as well as to natural, shifts in a river's bed. *Anderson-Tully Company v. Walls*, 266 F. Supp. 804 (1967). The abrupt diversion of the Missouri River across the base of the Blackbird Bend oxbow was visible and perceptible. Under

the authority of *Philadelphia Co.*, *supra*, and *Nebraska v. Iowa*, *supra*, the rechannelization project was avulsive in nature. Accordingly, the treaty rights to the Blackbird Bend Area remained unchanged. Title continued in the United States, in trust for the Omaha Tribe.

5. *Adverse Possession of the Blackbird Bend Area within the 1867 survey*

Once the oxbow of Blackbird Bend was severed from the rest of the reservation, non-Indians along the former eastern bank of the river moved onto the land without color of title. Those farmers from Iowa, no longer separated from the Blackbird Bend Area by the Missouri River, began planting and farming the land in disregard of the treaty rights of the Omahas. The trespassers appear to claim title through adverse possession, quiet title actions, and deed transfers among themselves. The courts have consistently rejected attempts to adversely possess Indian land. *United States v. 7,405.3 Acres of Land in Macon, Clay, and Main Counties*, 97 F. 2d 417 (C. C. A. N. C. 1856); *United States v. Russell*, 261 F. Supp. 196 (D. C. Okla. 1965). Private parties cannot claim adverse possession against lands held by the United States. *Proctor v. Palatur*, 15 F. 2d 974 (C. C. A. Wash. 1926). There is no way that the trespassers could get valid title to the Blackbird Bend Area under the doctrine of adverse possession.

Similarly ineffective were the quiet title actions brought in Iowa's courts. The major suit in this group was in Equity No. 17400, *Charles E. Lakin v. State of Iowa, et al.*, decree filed with Monona Co. Clerk of District Court on November 15, 1963. State courts have no jurisdiction

over controversies concerning title to Indian allotments during the trust period. *McKay v. Kalyton*, 204 U. S. 458 (1907); *Caesar v. Kraw*, 71 Okla. 233, 175 P. 927 (1920). Equally defective for these suits is the failure to include the United States as an indispensable party. *Fontenelle v. Omaha Tribe of Nebraska*, 430 F. 2d 143 (6th Cir. 1970). The conspicuous omission of the United States as a party emphasizes the spurious nature of the suits.

It is also relevant to note that Iowa did not add the Blackbird Bend Area to its tax rolls until 1969. This was 26 years after the 1943 Compact shifted Iowa's boundary to encompass the Blackbird Bend Area, and at least 10 years after rechannelization made the area contiguous with the original land mass of Iowa. The relative lateness of this action is at least some evidence that Iowa, until recently, may have considered the Blackbird Bend Area tax-exempt tribal land.⁴

C. Legal Conclusions and Recommended Action

The title claims of the present occupants of Blackbird Bend can be summarized quite succinctly: they had no rights in the land to begin with and they have no rights in it now. Title searches have failed to discover any patents from the United States to the present occupants. The doctrine of adverse possession is inapplicable and the quiet title actions have lacked proper jurisdiction. The 1943 Boundary Compact and the Missouri River rechannelization project have left the 1854 treaty rights intact. Only one legal conclusion is permissible: title to the

⁴ The Supreme Court has ruled that tribal land within a reservation is free from state taxation. *The Kansas Indians*, 5 Wall. 737 (1866).

Blackbird Bend Area within the 1867 survey is still held by the United States in trust for the Omaha Tribe.

Eviction proceedings should be initiated under 25 U. S. C. § 180, as should actions to quiet title in the Omaha Tribe and to recover monetary damages in the form of back rentals.

EXHIBIT C

IN THE DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY

Equity No. 18965

HAROLD JACKSON and OTIS PETERSON,

Plaintiffs,

vs.

EDWARD L. CLINE, et al.,

Defendants.

ORDER DIRECTING ISSUANCE OF TEMPORARY WRIT OF INJUNCTION

(Filed May 16, 1975)

NOW on this 16th day of May, 1975, this matter comes before the Court on the filing of plaintiffs' First Amendment to the Petition and equity on file herein, and the request by plaintiffs for the issuance of a Temporary Writ of Injunction, without notice, and the Court, after examination of the Amendment to the Petition and attached Exhibit "E", and after being otherwise fully advised in the premises, finds that this Court should enter an Order granting the plaintiffs relief as asked for as against the remaining defendants in this case in order to make the Order of Court entered herein on May 15,

1975, effectual; that by reason thereof, a Temporary Writ of Injunction should issue by the Clerk of this Court, without notice, and without additional bond, enjoining and restraining the other defendants from the acts alleged in said Petition; and it is, therefore,

ORDERED by the Court that the Clerk of this Court shall issue a Temporary Writ of Injunction, without notice, and without additional bond herein by plaintiffs, in the name of John Doe and Jane Doe, enjoining and restraining said persons from coming upon any portion of the real estate described as:

(Land description omitted in printing)

and from interfering with the farming of said land and the raising of crops thereon by the plaintiffs, their agents and employees; and it is further

ORDERED by the Court that the Clerk shall deliver said Temporary Writ of Injunction to the Sheriff of this County who shall serve the same upon any persons found upon said real estate, other than the plaintiffs, their agents and employees, and the Sheriff shall ascertain the names of said persons and list their names on the Return of such Temporary Writ of Injunction.

R. R. BRANNON

Judge of the 3rd Judicial District of Iowa
and the provisions of such writ shall apply to such persons who are served as soon as the sheriff files the return of service with the clerk of this court.

(Exhibit D and Affidavit omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,

Plaintiff,

vs.

HAROLD JACKSON, et al.,

Defendants.

ORDER

(Filed June 5, 1975)

This matter is before the court on resisted cross-applications for preliminary injunctions, filed in No. C 75-4024 on May 19, 1975 by plaintiff and on May 22, 1975 by defendants, and filed in No. C 75-4026 on May 20, 1975 by plaintiff and on May 28, 1975 by defendants. The applications for preliminary injunctions have been submitted for decision by the court upon the briefs and the record filed herein.

The controversy here involves the ownership of and possessory rights to an area of land comprising approximately 3000 acres bordering on the Missouri River in Western Iowa. During the mid-nineteenth century, the

lands in question were located on the Nebraska side of the Missouri River, circumscribed by an oxbow of the River known as Blackbird Bend.

As indicated by the Barrett survey of 1867, the Blackbird Bend Area of Nebraska was encompassed within the boundaries of the Omaha Indian Reservation, established pursuant to the treaty of March 16, 1854, 10 Stat. 1043,¹ with title in the United States as trustee for the Omaha Indian Tribe. The dispute arises as to the subsequent geophysical history of the contested lands.

The plaintiff in each case contends that the Blackbird Bend Area became located on the eastern bank² through an avulsive change in the course of the Missouri River caused by channelization projects carried on by the Corps of Engineers during the 1940's. An avulsive change in the River's course would not alter the status of title to the riparian lands. *Arkansas v. Tennessee*, 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638 (1917); *Nebraska v. Iowa*, 145 U. S. 519, 12 S. Ct. 976, 36 L. Ed. 798 (1891).

Defendants contend that the disputed lands have formed through accretion to the previous eastern shore of the River. Accretions to riparian land are added to the title ownership of the landowner. *Arkansas v. Tennessee*,

¹ The Omaha Tribe, exercising a prerogative under the treaty, selected the actual situs of the reservation in lieu of the description found in the treaty. See *Omaha Tribe v. United States*, 4 Ind. Cl. Comm. 627 (1957).

² This area became a part of Iowa when the States of Iowa and Nebraska agreed to fix their boundary line through the Boundary Compact of 1943. See *Nebraska v. Iowa*, 406 U. S. 117, 120 n. 4, 92 S. Ct. 1379, 31 L. Ed. 2d 733 (1972).

supra. Defendants are successors in interest to the allegedly accreted lands in this case.

The disputed area has been cleared and farmed since some time in the 1940's. Defendants Harold Jackson and Otis Peterson have leased the contested premises for the current crop year from Roy T. Wilson and Raymond G. Peterson, respectively. During April of this year, members of the Omaha Tribe, acting under authority of the Tribal Council, have entered upon the lands and posted signs declaring the area to be part of the Omaha Reservation. Bureau of Indian Affairs (BIA) officials assisted them in delimiting the boundaries.

Harold Jackson and Otis Peterson instituted an equity action on April 23 in Iowa District Court for Monona County³ seeking to enjoin members of the Tribe from entering upon the contested real estate. On May 16,⁴ following an amendment to the petition, the Iowa District Court issued a temporary writ of injunction restraining all members of the Tribe from entering upon said lands or interfering with the farming thereof by the plaintiffs in that case.

The United States in No. C 75-4024 seeks to quiet title to all lands in the Blackbird Bend area which allegedly remain a part of the Omaha Indian Reservation. The United States also prays for preliminary and permanent injunctions restraining defendants from prosecuting Equity No.

³ Equity No. 18965, District Court of the State of Iowa in and for Monona County.

⁴ On May 15, the court issued an order enjoining only certain named members of the Tribe from entering upon the disputed area.

18965 in the State court, from attempting to enforce the aforementioned orders of the State court, and from interfering with the possession, use, or occupancy of the lands in question by the Tribe.

In No. C 75-4026, the Omaha Tribe eschews a quiet title action, asserting that the institution of such an action by the United States is an ineffectual way for the Government to protect its ownership rights as trustee in the contested lands. Preliminary and permanent injunctions similar to those in No. C 75-4024 are sought by the Tribe, and the applications for preliminary injunction in both cases are therefore being considered simultaneously in this ruling. Defendants in each action seek a preliminary injunction enjoining all persons other than the defendants from interfering with possession of the contested lands by the defendants.

The granting of a preliminary injunction rests within the sound discretion of the court, with the burden on the applicant to show a substantial probability of success on the merits and irreparable injury absent issuance of an injunction. The two other factors to be considered are the likelihood of harm resulting to other parties to the proceedings, and the nature of any public interest to be served by granting the injunction. *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973); *Allison v. Froehlke*, 470 F. 2d 1123, 1126 (5th Cir. 1972); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F. Supp. 602, 603-604 (D. Minn. 1972).

Considering these factors as applied to this case, it is the court's view that plaintiffs are entitled to some form of a preliminary injunction.

It is undisputed that the Blackbird Bend area was previously within the Reservation boundary. The staff of the BIA has concluded, and the Solicitor of the Interior Department concurred in the conclusion, that approximately 3,190 acres in the Blackbird Bend region were still owned by the United States as part of the Reservation. Other than conclusory statements, defendants have produced no evidence to the contrary at this time.

The irreparable injury to be incurred here is the total loss of a growing season if one party or the other is not promptly prohibited from interfering with the other's attempts to farm the land. At present the apprehensiveness on both sides has prevented all but 160 acres of corn from being planted in the area.

The probability of financial injury to the defendants, tenants and purported landowners of the area in question, is substantial, but will be reduced by the court's form of injunction as set out below, which will require the net profits from this year's farming operation to be deposited with the Clerk of Court pending final determination of the quiet title action.

Finally, the public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty. Congress has expressed its desire to protect the interests of Indians in real property by prohibiting conveyance of such lands without the consent of the government. 25 USC §177; *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). A preliminary injunction is an appropriate provisional remedy when special federally protected rights of Indians are threatened. *Organized Village of Kake v.*

Egan, 80 S. Ct. 33, 4 L. Ed. 2d 34, 1959) (Brennan, J., acting in capacity of circuit justice).

Defendants argue that a preliminary injunction is intended to maintain the status quo, 7 *Moore's Federal Practice* §65.04[1], and the status quo is defined as the last uncontested status which preceded the pending controversy. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F. 2d 804, 808-809 (9th Cir. 1963); *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F. 2d 806, 808 (7th Cir. 1958). It is asserted by defendants that their possession in previous years was the last peaceable and uncontested occupancy, and that granting plaintiffs a preliminary injunction essentially awards them relief to which they would only be entitled upon a favorable determination on the merits.

The court cannot agree. The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land, and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course. But most significantly, the court views the present occupation by the Omaha Tribe, with the approval of the Tribal Council acting pursuant to its authority under 25 USC §476, and with the assistance of the BIA acting in its capacity as an executive agency, constitutes the status quo to be preserved. Designees of the Tribal Council have planted 160 acres and tilled another 500 acres, the only farm work done this spring in the area.

Since the United States is here seeking an injunction to prevent threatened irreparable injury to a federally

protected interest, to wit, possession of and title to lands originally owned by the United States in trust for the Omaha Indians, the prohibition against enjoining state court proceedings in 28 USC §2283 is not applicable here. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 77 S. Ct. 287, 1 L. Ed. 2d 267 (1957); *United States v. Akin*, 504 F. 2d 115 (10th Cir. 1974) (United States suing as trustee of water rights held on behalf of Indian tribes).

The State of Iowa entered a special appearance in this matter to contest jurisdiction because of improper service. Though subsequently served, the State argues that the delayed notice has prevented it from preparing detailed exhibits and arguments. The State asks that the land to which it claims an interest, and which is not under cultivation, be exempted from any injunctive decree. No accurate legal description of this property having been submitted, the court is unable to specifically position or exempt this parcel, but will entertain a motion for relief from the decree should the State deem it necessary.

It is therefore

ORDERED

1. Defendants' applications for preliminary injunction denied.

2. Plaintiffs' applications for preliminary injunction granted.

3. Each and every defendant, his agents, employees, and successors in interest, is hereby enjoined and restrained from interfering with the use and occupancy of the lands hereinafter described by the Omaha Tribe and its individual members, agents, employees or designees, and from prosecuting or attempting to prosecute that action

heretofore filed in the District Court of Iowa in and for Monona County, entitled *Jackson, et al. v. Cline, et al.*, Equity No. 18965, and from attempting to enforce any orders in said state court action directing any individual member of the tribe to vacate any portion of the lands hereinafter described, or any such orders permitting any of the defendants herein to occupy any portion of said lands, until such time as this case may be heard and final judgment entered. This order shall apply to all lands described as follows, and which are east of the 1943 Iowa Nebraska compact line and which have not been allotted to individual members of the Omaha Tribe and thereafter sold to nonmembers:

(Land description omitted in printing.)

4. Plaintiff Omaha Indian Tribe shall deposit with the Clerk of Court the net profits received for all crops harvested from the aforesaid lands during the calendar year 1975, together with a report of receipts and disbursements.

June 5, 1975.

/s/ Edward J. McManus
Chief Judge, United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

HAROLD JACKSON, et al.,
Defendants.

SEPARATE ANSWER AND COUNTERCLAIM
OF DEFENDANT, HAROLD JACKSON

(Filed June 9, 1975)

Comes now defendant, Harold Jackson, and for answer to the complaint of plaintiff and for counterclaim states:

ANSWER TO COMPLAINT

1. He denies the allegations of paragraph 1 of said complaint except that he admits that the value of the land which is at issue in this case exceeds \$10,000.00 and that the court has jurisdiction of this case under the provisions of Title 28, Section 1332 of the United States Code.

2. He denies the allegations of paragraph 2 of said complaint.

3. He denies the allegations of paragraph 3 of said complaint and alleges that he is the lawful tenant under a written lease, a true copy of which is attached hereto and made a part hereof, and further alleges that his landlord, Roy Tibbals Wilson, is the owner of the following described real estate:

(Description of land omitted in printing.)

He further alleges that the land described in Exhibit A attached to plaintiff's complaint has been totally destroyed by the Missouri River.

4. He denies the allegations of paragraph 4 of said complaint and alleges that he is lawfully entitled to possession of the land described in his lease and further alleges that plaintiff has no right or interest in that land.

5. He denies the allegations of paragraph 5 of said complaint except that he admits that he and defendant, Otis Peterson, filed an action in the District Court of Iowa, in and for Monona County, for injunctive relief to protect

their lawful possession of land described in their petition in that action. That injunctive relief has been granted by the District Court.

6. He denies the allegations of paragraph 6 of said complaint except that he admits that the Monona County case relates to the present land in place and not to the destroyed land described in said complaint.

7. He denies the allegations of paragraph 7 of said complaint except that he admits that the United States of America has filed a quiet title action in this court which is No. C 75-4024.

8. He denies the allegation of paragraph 8 of said complaint.

COUNTERCLAIM

9. He incorporates herein the affirmative allegations of his answer to plaintiff's complaint stated in paragraphs 1 through 8 inclusive above.

10. He is entitled to injunctive relief from this court against plaintiff to safeguard his lawful possession under the lease, a true copy of which is attached hereto, with respect to the land owned by his landlord, Roy Tibbals Wilson, described above.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed at the cost of plaintiff and that the court grant preliminary and permanent injunctions in favor of defendant, Harold Jackson, against plaintiff restraining plaintiff from interfering with the lawful possession by this defendant of the land owned by his landlord, Roy Tibbals Wilson, more particularly described above. Said defendant prays for all just other and further general

equitable relief as shall be deemed just by the court in the premises.

(Certificate of service and exhibits omitted in printing.)

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF IOWA WESTERN DIVISION

No. C-75-4026

OMAHA INDIAN TRIBE, etc.,

Plaintiff,

vs.

HAROLD JACKSON, et al.,

Defendants.

SEPARATE ANSWER AND COUNTERCLAIM OF DEFENDANT, OTIS PETERSON

(Filed June 16, 1975)

Comes now the defendant, Otis Peterson, and for his answer to the complaint of the plaintiff and for his counterclaim states:

ANSWER TO COMPLAINT

1. He denies the allegations of Paragraph 1 of said complaint except that he admits that the value of the land which is at issue in this case exceeds \$10,000.00 and that the Court has jurisdiction of this case under the provisions of Title 28, Section 1332 of the United States Code.

2. He denies the allegations of Paragraph 2 of said complaint.

3. He denies the allegations of Paragraph 3 of said complaint and alleges that he is the lawful tenant under a written lease, as extended, a true copy of said extension being attached hereto and made a part hereof, and further alleges that his landlord, RCP, Inc., is the owner of the following described real estate:

(Land description omitted in printing.)

He further alleges that the land described in Exhibit A attached to plaintiff's complaint has been previously totally washed away and destroyed by the Missouri River.

4. He denies the allegations of Paragraph 4 of said complaint and alleges that he is lawfully entitled to possession of the land described in his lease and further alleges that plaintiff has no right or interest in that land.

5. He denies the allegations of Paragraph 5 of said complaint except that he admits that he and the defendant Harold Jackson filed an action in the District Court of Iowa in and for Monona County for injunctive relief to protect their lawful possession of land described in their petition in that action. That injunctive relief has been granted by the District Court.

(Rest of Answer and Counterclaim omitted in printing.)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C-75-4026

OMAHA INDIAN TRIBE, etc.,

Plaintiff,

vs.

HAROLD JACKSON, et al.,

Defendants.

ANSWER OF INTERVENING DEFENDANTS
ROY TIBBALS WILSON AND
CHARLES E. LAKIN

(Filed August 26, 1975)

For answer to the plaintiff's complaint the intervening defendants, Roy Tibbals Wilson and Charles E. Lakin, admit, deny and allege as follows:

1. Admit that the Omaha Indian Tribe is organized under a constitution and by-laws duly ratified and approved as required by law. Said constitution and by-laws or charter authorizes and empowers said Tribe to sue and to be sued, and this court has jurisdiction over said plaintiff in this action. Admit that the lands which constitute the Omaha Indian Reservation are held by the United States in trust for the Omaha Tribe of Nebraska, but deny that the lands involved in this suit, the lands described in Exhibit "A" attached to plaintiff's complaint, are a part of said reservation and deny that they are held in trust by the United States for the Omaha Tribe of Nebraska. Admit

that this action involves the Omaha Tribe of Nebraska and certain Iowa defendants; that the value of the lands involved exceed \$10,000.00, and that the court has jurisdiction by reason of Title 18, Section 1332. These intervening defendants deny the other allegations contained in paragraph 1 of plaintiff's complaint.

2. These intervening defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of plaintiff's complaint and therefore deny the same.

3. Deny that either the plaintiff or the United States of America owns all or any part of the land described in Exhibit "A", attached to plaintiff's complaint, and deny that all or any of said land is a part of the Omaha Indian Reservation, and deny that it is held in trust by the United States of America for the Omaha Indian Tribe. Admit that in April and May of 1867, when the General Land Office survey was made by T. H. Barrett, surveyor, land which could be described as in Exhibit "A" attached to plaintiff's complaint (but of course without reference to the 1943 Iowa - Nebraska Compact Line or to the east or left bank of the Missouri River) existed, not in Monona County, Iowa, but within the borders of the state of Nebraska on the right or Nebraska bank of the Missouri River. All of said land east of said Iowa - Nebraska Compact Line between the years 1867 and 1943 was eroded away by the action of the Missouri River and ceased to exist at the described location, having been washed down the river. New land was created between the years 1867 and 1943 by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described in said Ex-

hibit "A" east of the 1943 Iowa - Nebraska Compact Line. Land was thereafter added by the process of accretion to the left or Iowa bank of the Missouri River west of said Compact Line and east of the present Missouri River channel. All of said accretion land upon its coming into existence became the property of the riparian owners on the Iowa bank of the Missouri River to whose land it had accreted. By mesne conveyances from said riparian owners or from persons who obtained title from or against them, the defendants, Roy Tibbals Wilson and Charles E. Lakin, became and are now the owners in fee simple of the portions of said accretion land which fall within the borders of tracts of land owned by them and appropriately described by Iowa section, township and range numbers as follows:

Roy Tibbals Wilson is the owner in fee simple of the following described land situated in Monona County, Iowa:

(Land description omitted in printing)

Roy Tibbals Wilson leased the above land to the defendant, Harold Jackson, under written lease dated August 15, 1974, for a term of one year from March 1, 1975, to February 28, 1976, and Harold Jackson is entitled to possession of said land under said lease.

Charles E. Lakin is the owner of the following described land which is situated in Monona County, Iowa:

(Land description omitted in printing.)

Although the land described in said Exhibit "A" was in 1867 a part of the Omaha Indian Reservation to which the United States held title for the use and benefit of the Omaha Tribe of Indians, said title was extinguished when said land ceased to exist when it was eroded away and

washed down the river. These intervening defendants deny each and every allegation of paragraph 3 of plaintiff's complaint not hereinabove admitted.

4. Deny each and every allegation of paragraph 4 of plaintiff's complaint. The memorandum from solicitor Kent Frizzell to Commissioner of Indian Affairs dated February 3, 1975, attached to plaintiff's complaint as Exhibit "B" and the allegations of paragraph 4 of plaintiff's complaint with respect thereto are immaterial and impertinent. Said memo consists of the opinions and conclusions of the writer thereof which are of no evidentiary value and are inadmissible in evidence. These intervening defendants move that said memo and allegations with respect thereto be stricken from plaintiff's complaint. The intervening defendants, Roy Tibbals Wilson and Charles E. Lakin, and those through whom they derived title, had, personally and by their tenants, been in actual, peaceable, non-contested possession of their respective lands described in paragraph 3 of this answer for more than thirty years prior to the commencement of this action, subject only to a brief invasion by members of the Omaha Tribe of Indians in the spring of 1973 which was terminated pursuant to a court order, and a second invasion commencing on April 2, 1975, which invasions have been resisted by the said intervening defendants and by the defendant Harold Jackson, to the best of their ability. During the above described period of thirty years or more the tillable land included in the tract described in paragraph 3 hereof has been cleared and rendered productive by these intervening defendants and their predecessors in title. The defendant, Harold Jackson, as tenant of the Wilson land described in paragraph 3 hereof, is entitled to possession thereof and prior

to the commencement of this action had been in possession thereof subject only to the interference with his possession by certain members of the Omaha Tribe of Indians in the spring of 1973 and again commencing April 2, 1975.

5. Deny each and every allegation of paragraph 5 of plaintiff's complaint except those hereinafter admitted. Admit and allege that the defendants Harold Jackson and Otis Peterson filed an action in the District Court of Iowa in and for Monona County which action is captioned "Harold Jackson and Otis Peterson, Plaintiffs, v. Edward L. Cline; Matthew Grant; Clifford Wolfe, Sr.; Eddie Wolfe; Lawrence Gilpin; and Charles McCullough; individually and as representing all persons who are members of the Omaha Tribe of Nebraska, or their agents, employees or representatives, and any and all other persons who claim any right to possession of 3,100 acres of land, more or less, in Monona County, Iowa, Defendants," Equity No. 18965, and after notice and hearing, at which Robert L. Sikma, Assistant United States Attorney, appeared for the United States and Donald E. O'Brien, attorney, appeared for the Omaha Tribe of Indians, that court issued an order on May 15, 1975, restraining Edward L. Cline, Dan Webster, Bruce Marr, William Webster, Joe Fremont and Lewis Webster, Jr., from entering upon certain lands therein described, and interfering with the farming of those lands by said Jackson and Peterson; and that Jackson and Peterson did on May 16, 1975, obtain a supplemental order from said court restraining all persons other than said Jackson and Peterson, their agents and employees, from coming on said land therein described the same as in the May 15 order, and from interfering with the farming of said land and the raising of crops thereon by the said Jackson and Peterson; that

Exhibit "C" attached to plaintiff's complaint herein is a copy of said order of May 16, 1975.

6. Deny each and every allegation of paragraph 6 of plaintiff's complaint.

7. Admit that the United States of America has filed a quiet title action in this court, No. C-75-4024, asking for injunctive relief and the quieting of title. Deny each and every other allegation contained in paragraph 7 of plaintiff's complaint.

8. Deny the allegations of paragraph 8 of plaintiff's complaint.

9. These intervening defendants deny that the plaintiff is entitled to any judgment as claimed in plaintiff's complaint, and allege that the defendant Charles E. Lakin, is entitled to a judgment quieting title in fee simple in him to the land described in paragraph 3 hereof as owned by him, and upholding his right to possession thereof as against the claims of the plaintiff and the Omaha Tribe of Indians; and that the defendant Roy Tibbals Wilson is entitled to a judgment quieting title in fee simple in him to the land described in paragraph 3 hereof as owned by him, and upholding his right to possession thereof as against the claims of the plaintiff, but subject to the rights of the defendant, Harold Jackson, under his lease above described. The defendants Roy Tibbals Wilson and Charles E. Lakin are entitled to an order declaring that the Omaha Tribe of Indians has no right, title or interest in or to the lands described in paragraph 3 hereof, and no right to possession thereof.

10. As an additional and separate defense these intervening defendants allege that the defendants Roy Tibbals

Wilson and Charles E. Lakin and their predecessors in title have been in open adverse possession of the lands described in paragraph 3 hereof under color of title for more than thirty years prior to the filing of the complaint in this action by plaintiff; that prior to April 2, 1975, the plaintiff had not contested the ownership and possession of said land by said defendants and their predecessors in title but had acquiesced in the same; that relying on the foregoing acquiescence of the plaintiff the said defendants and their predecessors in title purchased said land from the apparent owners thereof, cleared it of trees and otherwise prepared it for cultivation, installed irrigation equipment, dug drainage ditches, and paid taxes on said land, all involving great expense to these defendants and their predecessors in title. Also, witnesses who had knowledge of the action of the Missouri River in the vicinity of the land described in Exhibit A attached to plaintiff's complaint and in paragraph 3 of this answer, and of what effect such action had with respect to said land, have died and, due to the delay by the plaintiff in asserting its claim, said witnesses are unavailable to testify. By reason of the foregoing these defendants will be greatly prejudiced if the plaintiff is permitted to assert its claim effectively at this time, and the plaintiff by reason of its laches is estopped from claiming or asserting any title it might otherwise have in said tracts described in paragraph 3 hereof or in any part thereof.

COUNTERCLAIM

For their counterclaim against the plaintiff these intervening defendants allege as follows:

11. This court has jurisdiction over this counterclaim by reason of rule 24(a) and rule 13(a) of the Federal Rules of Civil Procedure.

12. These intervening defendants adopt and incorporate herein by this reference the allegations in their foregoing answer to plaintiff's complaint.

WHEREFORE, these intervening defendants pray that judgment be entered as follows:

(a) Setting aside the order of this court granting plaintiff's application for preliminary injunction; dissolving the preliminary injunction heretofore issued by this court; and granting a preliminary injunction to the defendants herein enjoining and restraining the plaintiff, Omaha Indian Tribe, its individual members, agents, employees, and other persons acting under or by their direction, from interfering with the possession and use of the lands described in paragraph 3 hereof by these intervening defendants and by Harold Jackson, the tenant of the defendant Roy Tibbals Wilson, until the rights of the parties to this action have been finally determined by this court.

(b) For a judgment quieting the title to the land described in paragraph 3 hereof in the defendants Roy Tibbals Wilson and Charles E. Lakin as their interests are there set forth, in fee simple; declaring that the plaintiff, the Omaha Tribe of Indians, and its members, have no right, title or interest in said described land or any part thereof; and enjoining the plaintiff, its agents, employees, members, and other persons acting under their direction, from asserting title to such lands and from interfering in any way with the possession, use and occupancy of said land by defendants Roy Tibbals Wilson and Charles E. Lakin, and their lessees and assigns.

(c) For such other relief as the court may find justified and for the costs of this action.

(Signatures and proof of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C-75-4067

OMAHA INDIAN TRIBE, Treaty of 1854 with the United States (10 Stat. 1043), Organized pursuant to the Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. 476) as amended,

Plaintiff,

vs.

DEFENDANTS:

TRACT I—BLACKBIRD BEND AREA

Agricultural & Industrial Investment Company; American Telephone & Telegraph Company; Benjamin, Edith; Benjamin, Herbert Nelson; Benjamin, Maurice Louis; Benson, James Brooks; Bentley, Helen; Boulden, George R.; Bolden, Matilda; Bolden, Vasco; Cox, Cleo; Craford, John K.; Craford, M. George; Craford, Ruth; Dale, Phyllis; Durr, Gladys; Fletcher, Lloyd; Follett, Frank Carlton; Great Lakes Pipeline Company; Henderson, Alma Schmidt; Iowa Public Service Company; Jackson, Harold; Jenkins, Letha; Kane, Rose Ann; Kirk, Bertha; Kirk, Harriet; Kiskadon, Mary Ann; Lakin, Charles E.; Lakin, Florence; Larson, Albert J.; Est Lund, John H.; Lund, Ruth J.; Magnolia Pipeline Company; McCoy, Ethel; Mid-American Pipeline Company; Mid-Continent Eastern Pipeline Corporation; Monona County Rural Electric Cooperative; Northern Natural Gas Company; Orr, Arthur; Orr, Robert; Peterson, Otis; R. G. P. Incorporated, an Iowa Corporation; Ruth, Anena; Ruth, George C.; Ruth, Richard A.; Ruth, Jean M.; Sanders, Fred; Sanders, Fred E.; Sanders, Rosalie; Socony Vacuum Oil Company; Sorenson, Darrell L.; Sorenson, Harold; Sorenson, Harold M.; Sorenson, Luea; Stangel, Ferd; State of Iowa, State of Iowa Conservation Commission; Torticilli, Edward L.; Torticilli, Mary A.; Torticilli, Regina Marie; Travelers Insurance Company; Virtue, Ariel; Virtue, W. W.; Willaday Farms, Inc.; Willey, Ross O.; Willey, Vincent R.;

Williams Brothers Pipeline Company; Wilson, Roy Tibbals;

TRACT II—MONONA BEND AREA

Agricultural & Industrial Investment Company; Anderson, Karen; Anderson, Richard L.; Carlson, Eva; Carlson, Harold; Carter, Mildred Orr; Clark, Hazel; Clark, Kenneth; Christensen, Chris; Dahl, Barbara; Dahl, Clara Grace; Dahl, Gordon; Dufrene, Doris; Dufrene, Harold B.; Everett, Myrva; Everett, R. J.; Fender, Lloyd P.; Fender, Verna Pearl; Gibler, Gertrude; Henderson, Alma Schmidt; Hicks, J. B. Substitute Trustee for Mildred C. Hicks; Hudgel, Maude B.; Huff, Ramona Orr; Jester, Henry L.; Kent, James; Kent, Sue; Koenig, Carroll; Kutzler, Lorraine; Olson, Emma Johanna; Parker, Alice; Parker, Nadine; Parker, Wallace G.; Raines, L. S.; Reitan, Carol Ann; Reitan, Robert E.; Rupp, Donald L.; Rupp, Lillian C.; Rupp, Roy R.; Ruth, Don E.; Ruth, Joyce M.; Ruth, Don E. & Joyce M., (Commercial); Sponder, Edna J.; Stevens, Lillie Mae; Sorenson, Roy T.; Stokely, Wilbur L.; Weaver, Dan K.

TRACT III—OMAHA MISSION BEND AREA

Blair, Emily S.; Ford, Donna C.; Goodman, Frances; Grosvenor, Ray L.; Iowa Public Service Company; Iowa State Conservation Commission; Jacobson, Hazel I.; Jacobson, Joan S.; Jacobson, Wm. S.; Marble, Minnie; McFarland, Coy W.; McFarland, Maude E.; McFarland, Ruby; Nelson, Fred E.; Nelson, Gladys E.; Nelson, Lloyd E.; Nelson, Carolyn Ann; Nelson, Larry L.; Olson, Ernest L.; Olson, Bernard M.; Olson, Larry M.; Olson, Leland M.; Queen, Harold; Ropes, John M.; Rush, Clyde H.; Swan, Glen; Swan, Grace; Swan, Ethel; Swan, P. C.; Taylor, Harry D.; Weber, Majayne Ropes.

COMPLAINT

To quiet title for immediate access permanent injunction order for quiet possession for damages.

(Filed October 6, 1975)

Comes now the OMAHA INDIAN TRIBE, acting pursuant to its Treaty with the UNITED STATES OF

AMERICA (10 Stat. 1043 et seq.), made and concluded in the City of Washington on the sixteenth day of March, one thousand eight hundred and fifty-four, the Constitution and laws of the United States, the Omaha Indian Tribe being a body corporate established pursuant to its Constitution and By-Laws formulated and adopted by the Omaha Indian Tribe, and approved by the Secretary of the Interior, principal agent of the United States, Trustee for the Omaha Indian Tribe, the Omaha Indian Tribe and its governing body, having been duly recognized by the Secretary of the Interior, all in accordance with Section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U. S. C. 476), and complains, alleges and avers that:

CLAIM NO. I

To quiet title in the Omaha Indian Tribe to 11,300 acres, more or less, of land in the Omaha Indian Reservation within the State of Iowa.

1. This Court has jurisdiction of this civil action brought by the Omaha Indian Tribe on its own behalf, pursuant to Section 1331 of Title 28 of the United States Codes, which confers jurisdiction upon this Court involving actions that arise " * * * under the Constitution, laws, or treaties" of the United States, "wherein the matter in controversy exceeds the sum or value of \$10,000" and pursuant to Section 1362 of Title 28 of the United States Codes which provides this Court " * * * shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

2. From time immemorial the Omaha Indian Tribe, plaintiff herein, occupied a vast area of land totaling 5,283,265 acres which was intersected by the Missouri River and located in part in the present States of Iowa and Nebraska. The Omahas, from time immemorial, had and still have their own communities, institutions, laws, and customs, exercising inherent powers of self-government. For over a century and a half the Omaha Indian Tribe has entered into Treaties with the United States. The final Treaty, in so far as here pertinent, between those two sovereigns was signed in the City of Washington, on March 16, 1854 (10 Stat. 1043), the "Treaty with the Omaha, 1854" hereafter referred to as the Treaty of 1854.

3. By the Treaty of 1854, the Omaha Indian Tribe reserved to itself—did not grant to the United States—the present Omaha Indian Reservation. That land thus reserved by the Omahas pursuant to their Treaty of 1854, was all situated in the soon thereafter created Territory of Nebraska. Several years subsequent to the Treaty of 1854 the State of Nebraska was admitted into the Union.

4. The middle of the main channel of the Missouri River was the common boundary established between the Omaha Indian Reservation and the State of Iowa, all as prescribed by the Treaty of 1854, the Act of Congress for the admission of Iowa into the Union and the Constitution of the State of Iowa. Similarly, the middle of the main channel of the Missouri River was declared to be the common boundary between the States of Iowa and Nebraska.

5. The State of Iowa (1 Iowa Code Anno. 85 et seq.) and the State of Nebraska (2A Revised Statutes of Ne-

braska, 728 et seq.) ratified the Iowa-Nebraska Compromise Boundary Compact, which was approved by the Congress and became effective by the Act of July 12, 1943, Ch. 220 (57 Stat. 494). By that Compromise Boundary Compact the middle of the main channel of the Missouri River was no longer the common boundary between the State of Iowa, the Omaha Indian Reservation and the State of Nebraska. That Compromise Boundary between the State of Iowa and the State of Nebraska, did not and could not affect the title to the lands of the Omaha Indian Tribe constituting its Reservation, which title to the lands involved is the subject matter of this Complaint.

6. The Omaha Indian Tribe, pursuant to its Treaty of 1854, the Constitution and laws of the United States, holds title to and is entitled to have full, peaceful and quiet possession of 11,300 acres, more or less, of land, being that part of the Omaha Indian Reservation, situated in Monona County, State of Iowa.

7. Those 11,300 acres of land, more or less, title to which is in the Omaha Indian Tribe and being that part of the Omaha Indian Reservation within the State of Iowa referred to in the paragraph of this Complaint which immediately precedes, are divided for the purposes of this litigation, into three separate tracts or parcels of land referred to throughout this Complaint as:

- a. Tract I, The Blackbird Bend Area,
comprised of 6,390 acres, more or less;
- b. Tract II, The Monona Bend Area,
comprised of 4,185 acres, more or less;
- c. Tract III, The Omaha Mission Bend Area,
comprised of 725 acres, more or less;
Totalling 11,300 acres, more or less.

8. Attached to this Complaint is a map, marked Exhibit A, entitled "Omaha Indian Reservation Boundary Determination", hereafter referred to as Exhibit A and by reference made a part of this Complaint, setting forth the Iowa-Nebraska Compromise Compact Boundary from the northern boundary of the Omaha Indian Reservation in the State of Iowa to the southern boundary of that Reservation in the State of Iowa.

9. There is likewise set forth on Exhibit A of this Complaint the eastern boundary of the Omaha Indian Reservation within the State of Iowa. Also set forth on Exhibit A of this Complaint are the eastern boundaries of the above referred to: Tract I, The Blackbird Bend Area; Tract II, The Monona Bend Area; and Tract III, The Omaha Mission Bend Area of the Omaha Indian Reservation within the State of Iowa, all as set forth in paragraph 6 of this Complaint.

10. Attached to this Complaint, marked Exhibit B, entitled "Legal Description of the Omaha Indian Reservation Within the State of Iowa," hereafter referred to as Exhibit B of this Complaint, is a precise and accurate legal description of the Omaha Indian Reservation Within the State of Iowa. Those lands, the title to which resides in the Omaha Indian Tribe, all as averred above, are sometimes referred to in this Complaint as the Omaha Indian Reservation within the State of Iowa.

11. In clear violation of the Treaty of 1854, the Constitution and laws of the United States, and of the rights, title and interests of the Omaha Indian Tribe in and to the lands depicted on Exhibit A and as fully and accurately described in Exhibit B of this Complaint, all as averred

above, the above named defendants and each of them, claim some right, title, interest or estate adverse to those rights, title, and interests of the Omaha Indian Tribe, in and to the lands of the Omaha Indian Reservation within the State of Iowa. Those adverse claims of the defendants and each of them, in and to the rights, title and interests of the Omaha Indian Tribe in and to the lands of the Omaha Indian Reservation within the State of Iowa, arise from illegal and willful trespasses upon and occupancy of those lands of the Omaha Indian Tribe and are invalid, illegal and, being totally without merit, are null and void and of no force and effect.

12. The Omaha Indian Tribe denies that the defendants or any of them have any valid right, title, interest or estate in or to any of the lands comprising the Omaha Indian Reservation within the State of Iowa, all of which are depicted on Exhibit A and described in Exhibit B of this Complaint, but rather the Omaha Indian Tribe affirmatively alleges those adverse claims of the defendants and each of them are illegal, invalid and totally without merit, all as averred above.

13. The Omaha Indian Tribe, by reason of the willful and illegal trespasses upon and occupancy of, and the illegal and invalid claimed rights, title, interests and estates in and to the lands comprising the Omaha Indian Reservation within the State of Iowa by the above named defendants and each of them, is now and has been for many years past, suffering irreparable damages and the Omaha Indian Tribe will, unless and until the relief and all of it prayed for in this Complaint is awarded to it, continue to suffer those irreparable damages.

14. The Omaha Indian Tribe is entitled to judgment by this Court entered against the defendants and each of them, adjudging, determining, declaring and quieting its title in and to the lands of the Omaha Indian Reservation within the State of Iowa, and denying each and every adverse claim of the defendants, and the Omaha Indian Tribe is entitled to a judgment and decree restoring it to full, peaceful and quiet possession of the full 11,300 acres, more or less, of the lands comprising that part of the Omaha Indian Reservation within the State of Iowa.

CLAIM NO. II

For Permanent Injunction, omitted in printing

CLAIM NO. III

For Immediate Possession and Payment of Damages,
omitted in printing

WHEREFORE, the Omaha Indian Tribe, Plaintiff herein, prays this Court for entry of a judgment in its favor:

* * *

4. Determining, declaring, adjudging and quieting the title of the Omaha Indian Tribe, Plaintiff herein, to the lands of the Omaha Indian Reservation within the State of Iowa, which lands are described with particularity in Exhibit B and clearly depicted and designated on Exhibit A of this Complaint; determining, declaring, and adjudging that Defendants have no right, title, interest or estate in or to the lands of the Omaha Indian Reservation within the State of Iowa, title to which resides in the Omaha Indian Tribe; forever restraining and enjoining the Defendants and each of them from claiming or assert-

ing any right, title, interest or estate in and to the lands of the Omaha Indian Reservation within the State of Iowa referred to above; said Plaintiff prays for the establishment of the Plaintiffs estate and that the Defendants and each of them be barred and forever estopped from having or claiming any right or title to these premises adverse to the Plaintiff; forever restraining and enjoining the Defendants and each of them from interfering in any way with the free and ready access, full use and occupancy by the Omaha Indian Tribe, its individual members of that Tribe, agents, employees, lessees and designees and the United States of America, Trustee for the Omaha Indian Tribe and its authorized agents, employees, and contractors.

* * *

(Paragraphs 1 through 3 and 5 through 8 omitted in printing).

OMAHA TRIBE OF NEBRASKA

BY: /s/ Edward L. Cline

Dated: October 6, 1975.

ATTORNEYS FOR TRIBE

O'BRIEN & O'BRIEN

BY: /s/ John T. O'Brien

916 Grandview Blvd.

Sioux City, Iowa 51101

(Verification omitted in printing).

(Exhibits B (land description), C-1 (Barrett Survey retracement description) and D (6/5/75 order, printed following complaint in C75-4026) omitted in printing).

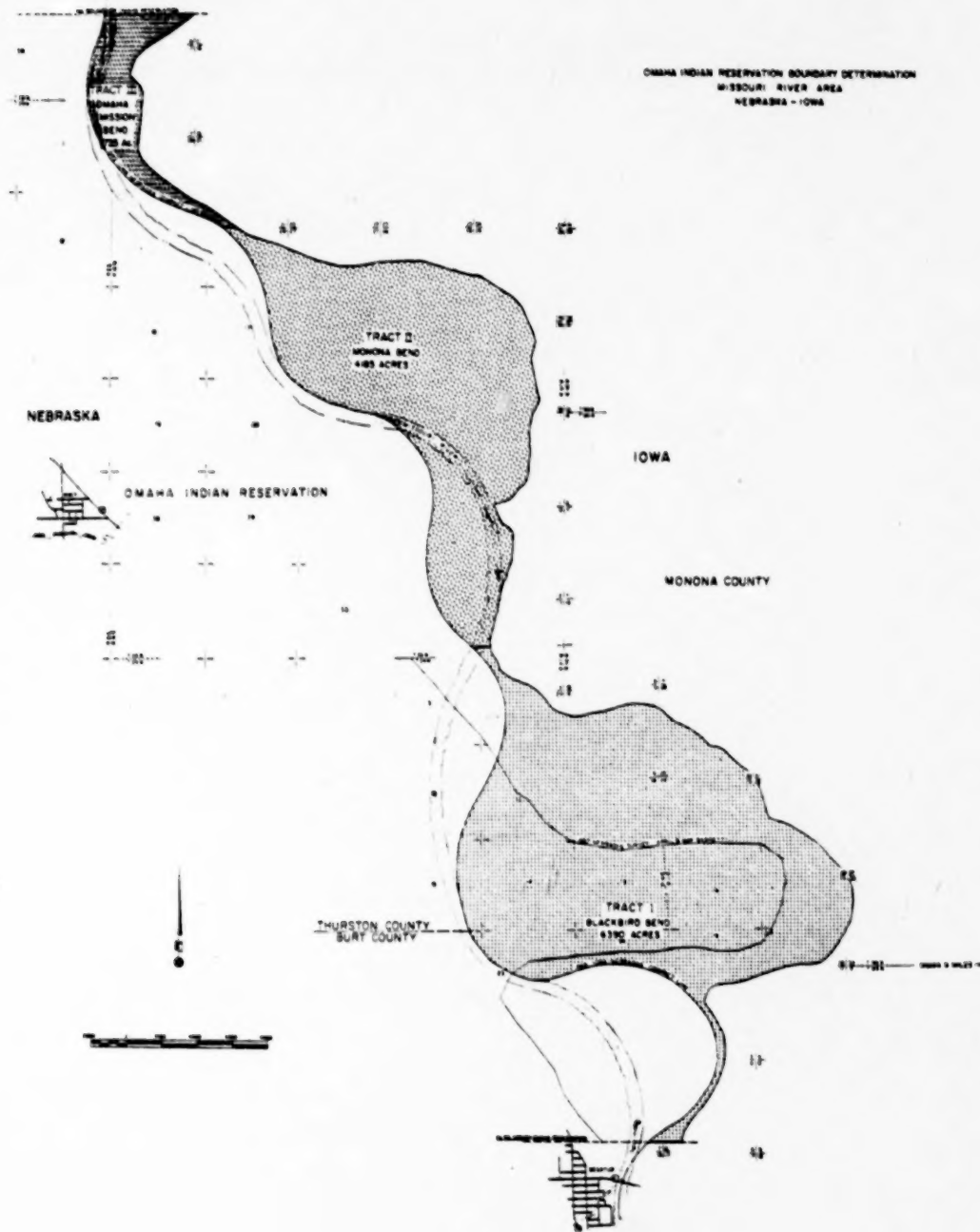


EXHIBIT A

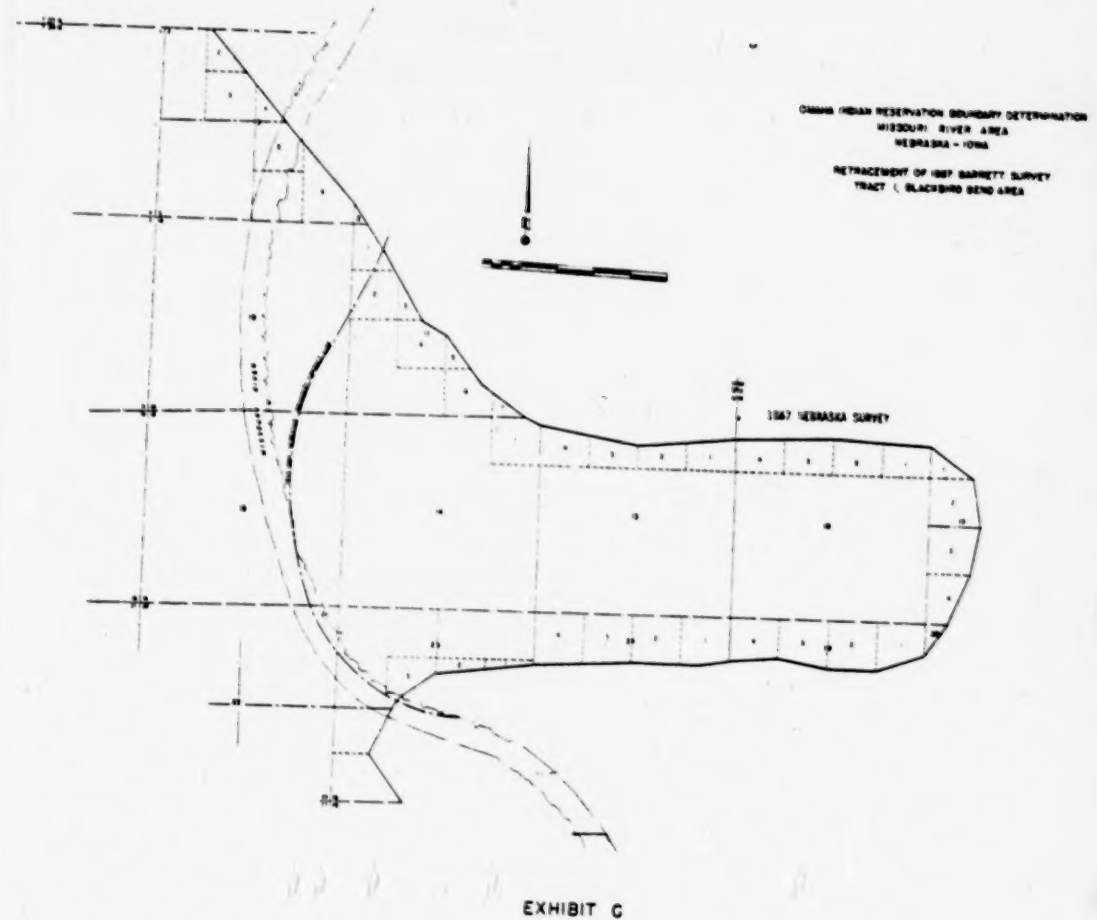


EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4067

OMAHA INDIAN TRIBE,
Plaintiff,

vs.

BLACKBIRD BEND AREA, et al.,
Defendants.

ANSWER OF DEFENDANTS STATE
OF IOWA AND STATE OF
IOWA CONSERVATION COMMISSION

DIVISION ONE

CLAIM NO. 1

For an answer to Claim No. 1 of the Complaint, Defendants State of Iowa and State of Iowa Conservation Commission admit, deny and allege as follows:

1. Defendants admit paragraph 1 of the Complaint.

2. Defendants admit that the Omaha Indian Tribe occupied an area of land in the present State of Nebraska, that it exercised and still exercises certain powers of self-government under the laws of the United States, and that it was party to certain agreements with the United States of America, including the agreement referred to in the Complaint as "the Treaty of 1854". Defendants further allege that they lack knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 2 of the Complaint, and such allegations are therefore denied.

3. Defendants admit that the Treaty of 1854 purports to reserve to the Omaha Indian Tribe certain lands referred to therein, situated in the Territory of Nebraska, and the State of Nebraska was thereafter admitted to the Union. Defendants further allege that they lack knowledge or information sufficient to form a belief as to what if any land, referred to in the Treaty of 1854, was reserved to the Omaha Indian Tribe and was or is occupied by the present Omaha Indian Reservation.

4. Defendants admit that the middle of the main channel of the Missouri River for a period of time was the boundary between the states of Iowa and Nebraska.

5. Defendants admit that the boundary between the states of Iowa and Nebraska was fixed by the Iowa-Nebraska Boundary Compact so that the middle channel of the Missouri River was no longer the boundary between those states in some areas. Defendants deny the remaining allegations of paragraph 5 of the Complaint.

6. Defendants deny the allegations in paragraph 6 of the Complaint.

7. Defendants deny that title to the land referred to in paragraph 7 of the Complaint is in the Omaha Indian Tribe and that it is part of the Omaha Indian Reservation.

8. Defendants admit the Exhibit referred to in paragraph 8 of the Complaint purports to be a map setting forth the Iowa-Nebraska Compact boundary in the vicinity of the Omaha Indian Reservation. Defendants deny the remaining allegations contained in paragraph 8 of the Complaint.

9. Defendants deny the Exhibit referred to in para-

graph 9 of the Complaint sets forth the eastern boundary of the Omaha Indian Reservation in the State of Iowa.

10. Defendants deny the Exhibit referred to in paragraph 10 of the Complaint describes the Omaha Indian Reservation within the State of Iowa.

11. Defendants admit they claim right, title and interest in certain land referred to in paragraph 11 of the Complaint. Defendants deny the remaining allegations in paragraph 11 of the Complaint.

12. Defendants deny the allegations in paragraph 12 of the Complaint.

13. Defendants deny the allegations in paragraph 13 of the Complaint.

14. Defendants deny the allegations in paragraph 14 of the Complaint.

(Answer to Claim No. 2 omitted in printing).

(Answer to Claim No. 3 omitted in printing).

DIVISION II

Further answering, Defendants State of Iowa and State of Iowa Conservation Commission allege as follows:

35. Defendant State of Iowa is a sovereign state of the United States, admitted thereto in 1846 under 9 Stat. L. 117, and Defendant State of Iowa Conservation Commission is a lawful agency of the State of Iowa and a part of the government thereof.

36. Part of the land described in the Complaint is within the State of Iowa and owned by the State of Iowa as sovereign.

37. Defendants own the bed of the Missouri River between the thalweg and the ordinary high water mark and bank on the easterly side of the river, and islands growing up out of that portion of the riverbed and all abandoned channel of that portion of the river.

38. Part of said land is described in Exhibit A, attached hereto, and consists of an island and abandoned river channel lying on the easterly side of the thalweg of the Missouri River and on the easterly side of the compact line entered into between Iowa and Nebraska in 1942 and approved by Congress in 1943, 57 Stat. L. 495.

39. The State of Iowa owns and has the right and title to some of the land described in Exhibit A, attached hereto, by additional reason of quit claim deeds executed to the State of Iowa and filed and recorded in the office of the Monona County Recorder on May 25, 1965, Book 77 Land Deeds page 233, and May 25, 1965, Book 77 Land Deeds page 238, which deeds were executed in settlement of boundaries owned by the State of Iowa as sovereign.

40. Other land claimed by the Plaintiff consists of land belonging to the State of Iowa by virtue of action of the Missouri River, being land between the thalweg and the ordinary high water mark and bank on the easterly side of the river, islands growing up out of that portion of the river bed and abandoned channel of that portion of the river.

41. The western boundary of the State of Iowa was established by the United States Congress in 1943 and rights of the parties to this action were fixed thereby.

DIVISION III

42. Land which may at one time have been within the geographical area of the Omaha Indian Reservation or in the past occupied by the Omaha Indians, which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff to said land was extinguished thereby.

43. Plaintiff and its predecessors abandoned and relinquished their rights, title and possession, if any they had, to the land in question.

44. Plaintiff, its predecessors, agents and representatives did not assert any claim to the land in question until after witnesses having knowledge of the facts material herein died and evidence otherwise available was lost, so that Plaintiff's claim is barred by laches.

DIVISION IV

Counter-Claim

For a counter-claim against the plaintiff the defendants State of Iowa and State of Iowa Conservation Commission allege as follows:

45. This Court has jurisdiction over this counter-claim by reason of Rule 13(a) of the Federal Rules of Civil Procedure.

46. The defendants State of Iowa and State of Iowa Conservation Commission adopt by reference their answers in paragraphs 1 through 44, above, as if fully set forth.

47. An accurate legal description of the land owned by the State of Iowa within the area described in the com-

plaint as Tract I is annexed hereto and marked Exhibit "A".

48. Accurate legal descriptions of the land owned by the State of Iowa within the areas described in the complaint as Tract II and Tract III are annexed hereto and marked Exhibit "B" and Exhibit "C".

WHEREFORE, the defendants State of Iowa and State of Iowa Conservation Commission pray that judgment be entered quieting title to the land described in Exhibit "A", Exhibit "B" and Exhibit "C", annexed hereto, in the defendant State of Iowa in fee simple, declaring that plaintiff and its members have no right, title or interest in said described land, or any part thereof; enjoining the plaintiff and its members from asserting title to such lands and from interfering in any way with the possession, use and occupancy of said lands by the defendants State of Iowa Conservation Commission, dismissing plaintiff's complaint at plaintiff's costs, and granting such other and further relief as to the Court may seem just.

RICHARD C. TURNER

Attorney General of Iowa

CLIFFORD E. PETERSON

JAMES C. DAVIS

Assistant Attorneys General

/s/ Bennett Cullison, Jr.

P. O. Box 68

Harlan, Iowa 51537

Telephone: (712) 755-2192

Attorneys for Defendants

State of Iowa and State of

Iowa Conservation Commission

(Proof of service omitted in printing).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4067

OMAHA INDIAN TRIBE, etc.,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT
COMPANY, et al.,

Defendants.

ANSWER OF DEFENDANTS ROY TIBBALS WIL-
SON, HAROLD JACKSON, CHARLES E. LAKIN,
AND FLORENCE LAKIN

For answer to Claim No. I of plaintiff's complaint the defendants, Roy Tibbals Wilson, Harold Jackson, Charles E. Lakin and Florence Lakin, admit, deny and allege as follows:

1. Admit that the Omaha Indian Tribe is organized under a constitution and by-laws duly ratified and approved as required by law, that said constitution and by-laws or charter authorizes and empowers said tribe to sue and to be sued; that this action involves the Omaha Indian Tribe; that the value of the lands involved exceeds \$10,000.00. These defendants deny the other allegations contained in paragraph 1 of plaintiff's complaint.

2. These defendants disclaim any interest in the lands referred to and described in plaintiff's complaint and exhibits A and B attached thereto, as Tract II, Monona Bend, and Tract III, Omaha Mission Bend, and allege that they are without knowledge or information suf-

ficient to form a belief as to the truth of the allegations with regard to said tracts in plaintiff's complaint.

3. Admit that the lands which constitute the Omaha Indian Reservation are held by the United States in trust for the Omaha Indian Tribe, but deny that the lands involved in this suit, the lands described in plaintiff's complaint as Tract I, Blackbird Bend, are a part of said reservation and deny that they are held in trust by the United States for the Omaha Indian Tribe.

4. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of plaintiff's complaint.

5. Admit the allegations of paragraphs 4 and 5 of plaintiff's complaint.

6. Deny the allegations of paragraph 6 of plaintiff's complaint.

7. With respect to paragraphs 7, 8, 9 and 10 of plaintiff's complaint, these answering defendants admit that the exhibits A and B, attached to and made a part of plaintiff's complaint, contain a description of land there referred to as "Tract I, the Blackbird Bend Area," claimed in said complaint to be a part of the Omaha Indian Reservation, but these defendants deny each and every other allegation in said paragraphs 7, 8, 9 and 10 contained and specifically deny that either the plaintiff or the United States of America owns all or any part of the land contained in said Tract I, and deny that all or any of said land is a part of the Omaha Indian Reservation, and deny

that it is held in trust by the United States of America for the Omaha Indian Tribe.

8. With respect to paragraphs 11, 12, 13 and 14 of plaintiff's complaint, these defendants admit that in April and May of 1867, when the General Land Office survey was made by T. H. Barrett, surveyor, land which could be described as in Exhibits "C" and "C-1" attached to plaintiff's complaint (but of course without reference to the 1943 Iowa-Nebraska Compact line or to the east or left bank of the Missouri River) existed, not in Monona County, Iowa, but within the borders of the state of Nebraska on the right or Nebraska bank of the Missouri River. All of said land was eroded away by the action of the Missouri River between the years 1867 and 1943 and ceased to exist at the described location, having been washed down the river. New land was created between the years 1867 and 1943 by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described in said Exhibits "C" and "C-1" and over all of the rest of the area referred to in plaintiff's complaint as Tract I, Blackbird Bend, which in 1867 or at any time since then was occupied by any part of the channel of the Missouri River. Land was thereafter added by the process of accretion to the left or Iowa bank of the Missouri River west of said Compact Line and east of the present Missouri River channel. All of said accretion land upon its coming into existence became the property of the riparian owners on the Iowa Bank of the Missouri River to whose land it had accreted. By mesne conveyances from said riparian owners or from persons who obtained title from or against them, the defendants, Roy Tibbals Wilson and Charles E.

Lakin, became and are now the owners in fee simple of the portions of said accretion land which fall within the borders of tracts of land owned by them and appropriately described by Iowa section, township and range numbers as follows:

Roy Tibbals Wilson is the owner in fee simple of the following described land situated in Monona County, Iowa:

(Description omitted in printing.)

Roy Tibbals Wilson leased the above land to the defendant, Harold Jackson, under written lease dated August 15, 1974, for a term of one year from March 1, 1975, to February 28, 1976, and Harold Jackson is entitled to possession of said land under said lease.

Charles E. Lakin is the owner of the following described land which is situated in Monona County, Iowa:

(Description omitted in printing.)

Although the land described in said Exhibits "C" and "C-1" was in 1867 a part of the Omaha Indian Reservation to which the United States held title for the use and benefit of the Omaha Tribe of Indians, said title was extinguished when said land ceased to exist when it was eroded away and washed down the river. These answering defendants deny each and every allegation of paragraphs 11, 12, 13 and 14 of plaintiff's complaint not hereinabove admitted.

9. As an additional and separate defense these answering defendants allege that the defendants Roy Tibbals Wilson and Charles E. Lakin and their predecessors

in title have been in actual, open, notorious, exclusive, continuous and adverse possession of the lands described in paragraph 8 hereof under color of title for more than ten years (approximately forty years as alleged by plaintiff) prior to the assertion of any claim thereto by plaintiff, and the pertinent statute of limitations precludes plaintiff from effectively asserting any claim of title or interest in said property, and has extinguished any right, title or interest it might otherwise have had in said land.

10. As an additional and separate defense these answering defendants allege that prior to April 2, 1975, the plaintiff had not contested the ownership and possession of said land by said defendants and their predecessors in title but had acquiesced in the same; that relying on the foregoing acquiescence of the plaintiff the said defendants and their predecessors in title purchased said land from the apparent owners thereof, paid taxes on said land, and with respect to the land described in paragraph 8 hereof as owned by Wilson, cleared it of trees and otherwise prepared it for cultivation, installed irrigation equipment, dug drainage ditches, all involving great expense to these defendants and their predecessors in title. Also, witnesses who had knowledge of the action of the Missouri River in the vicinity of the land described in Exhibits "C" and "C-1" attached to plaintiff's complaint and in paragraph 8 of this answer, and of what effect such action had with respect to said land, have died and, due to the delay by the plaintiff in asserting its claim, said witnesses are unavailable to testify. By reason of the foregoing these defendants will be greatly prejudiced if the plaintiff is permitted to assert its claim effectively at this time, and the plaintiff by reason

of its laches is estopped from claiming or asserting any title it might otherwise have in said tracts described in paragraph 8 hereof or in any part thereof.

11. These defendants deny that the plaintiff is entitled to any judgment as claimed in plaintiff's complaint, and allege that the defendant, Charles E. Lakin, is entitled to a judgment quieting title in fee simple in him to the land described in paragraph 8 hereof as owned by him, and upholding his right to possession thereof as against the claims of the plaintiff and the Omaha Tribe of Indians; and that the defendant Roy Tibbals Wilson is entitled to a judgment quieting title in fee simple in him to the land described in paragraph 8 hereof as owned by him, and upholding his right to possession thereof as against the claims of the plaintiff, but subject to the rights of the defendant, Harold Jackson, under his lease above described. The defendants, Roy Tibbals Wilson and Charles E. Lakin are entitled to an order declaring that the Omaha Tribe of Indians has no right, title or interest in or to the lands described in paragraph 8 hereof, and no right to possession thereof.

(Answers to Claim Nos. II and III omitted in printing.)

WHEREFORE, these defendants pray that each and every prayer of plaintiff's complaint be denied, that plaintiff's complaint be dismissed, and that the Court award to these defendants their costs.

COUNTERCLAIM

For their counterclaim against the plaintiff these answering defendants allege as follows:

20. This Court has jurisdiction over this counterclaim by reason of Rule 24 (a) and Rule 13 (a) of the Federal Rules of Civil Procedure.

21. These defendants adopt and incorporate herein by this reference the allegations in their foregoing answer to plaintiff's complaint.

WHEREFORE, these defendants pray that judgment be entered as follows:

(a) Setting aside the order of this Court in cases C 75-4024 and C 75-4026, both now consolidated herewith, granting plaintiff's application for preliminary injunction; dissolving the preliminary injunction heretofore issued by this Court; and granting a preliminary injunction to these defendants herein enjoining and restraining the plaintiff, Omaha Indian Tribe, its individual members, agents, employees, and other persons acting under or by their direction, from interfering with the possession and use of the lands described in paragraph 8 hereof by these answering defendants until the rights of the parties to this action have been finally determined by this Court.

(b) For a judgment quieting title to the land described in paragraph 8 hereof in the defendants Roy Tibbals Wilson and Charles E. Lakin as their interests are there set forth, in fee simple; declaring that the plaintiff, the Omaha Tribe of Indians, and its members, have no right, title or interest in said described land or any part thereof; and enjoining the plaintiff, its agents, employees, members, and other persons acting under their direction, from asserting title to such lands and from interfering in any way with the possession, use and occupancy of

said land by defendants Roy Tibbals Wilson and Charles E. Lakin, and their lessees and assigns.

(c) For such other relief as the Court may find justified and for the costs of this action.

SWARR, MAY, SMITH & ANDERSEN
By /s/ Edson Smith

3535 Harney Street
Omaha, Nebraska 68131
(402) 341-5421

KENNEDY, HOLLAND, DeLACY
& SVOBODA

By /s/ Thomas R. Burke

1900 First National Center
Omaha, Nebraska 68102
(402) 342-8200

JOHNSON, STUART, TINLEY,
PETERS & THORN

By /s/ Jack W. Peters

50-511 Park Building
Council Bluffs, Iowa 51501
(712) 322-4033

Attorneys for Defendants Roy Tibbals Wilson, Harold Jackson, Charles E. Lakin and Florence Lakin

(Proof of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4067

OMAHA INDIAN TRIBE, ET AL.,

Plaintiff,

vs.

AGRICULTURAL AND INDUSTRIAL INVESTMENT
COMPANY, ET AL.,

Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANTS
RGP, Inc. and OTIS PETERSON

For answer to Claim No. 1 of Plaintiff's Complaint, the defendants, RGP, Inc. and Otis Peterson, admit, deny and allege as follows:

1. Admit that the Omaha Indian Tribe is organized under a constitution and by-laws duly ratified and approved as required by law, and that said constitution and by-laws or charter authorizes and empowers said tribe to sue and to be sued; that this action involves the Omaha Indian Tribe; that the value of the lands involved exceeds \$10,000.00. These defendants deny the other allegations contained in paragraph 1 of plaintiff's complaint.

2. These defendants disclaim any interest in the lands referred to and described in plaintiff's complaint and exhibits A and B attached hereto, as Tract II, Monona Bend, and Tract III, Omaha Mission Bend, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations with regard to said tracts in plaintiff's complaint.

3. Admit that the lands which constitute the Omaha Indian Reservation are held by the United States in trust for the Omaha Indian Tribe, but deny that the lands involved in this suit, the lands described in plaintiff's complaint as Tract I, Blackbird Bend, are a part of said reservation and deny that they are held in trust by the United States for the Omaha Indian Tribe.

4. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of plaintiff's complaint.

5. Admit the allegations of paragraphs 4 and 5 of plaintiff's complaint.

6. Deny the allegations of paragraph 6 of plaintiff's complaint.

7. With respect to paragraphs 7, 8, 9 and 10 of plaintiff's complaint, these answering defendants admit that the exhibits A and B, attached to and made a part of plaintiff's complaint, contain a description of land there referred to as "Tract I, the Blackbird Bend Area," claimed in said complaint to be a part of the Omaha Indian Reservation, but these defendants deny each and every other allegation in said paragraphs 7, 8, 9 and 10 contained and specifically deny that either the plaintiff, or the United States of America owns all or any part of the land contained in said Tract I, and deny that all or any of said land is a part of the Omaha Indian Reservation, and deny that it is held in trust by the United States of America for the Omaha Indian Tribe.

8. With respect to paragraphs 11, 12, 13 and 14 of plaintiff's complaint, these defendants admit that in April

and May of 1867, when the General Land Office survey was made by T. H. Barrett, surveyor, land which could be described as in Exhibits "C" and "C-1" attached to plaintiff's complaint (but of course without reference to the 1943 Iowa-Nebraska Compact Line or to the east or left bank of the Missouri River) existed, not in Monona County, Iowa, but within the borders of the state of Nebraska on the right or Nebraska bank of the Missouri River. All of said land was eroded away by the action of the Missouri River between the years 1867 and 1943 and ceased to exist at the described location, having been washed down the river. New land was created between the years 1867 and 1943 by the process of accretion to the left or Iowa bank of the Missouri River which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described in said Exhibits "C" and "C-1" and over all of the rest of the area referred to in plaintiff's complaint as Tract I, Blackbird Bend, which in 1867 or at any time since then was occupied by any part of the channel of the Missouri River. Land was thereafter added by the process of accretion to the left or Iowa bank of the Missouri River west of said Compact Line and east of the present Missouri River channel. All of said accretion land upon its coming into existence became the property of the riparian owners on the Iowa Bank of the Missouri River to whose land it had accreted. By mesne conveyances from said riparian owners or from persons who obtained title from or against them, defendant RGP, Inc. became and is now the owner in fee simple of the portion of said accretion land which falls within the borders of tracts of land owned by it and appropriately described by Iowa section, township and range numbers as follows:

RGP, Inc. is the owner in fee simple of the following land situated in Monona County, Iowa:

(Land description omitted in printing.)

RGP, Inc. leased the above land to the defendant, Otis Peterson, under written lease dated January 28, 1967 for a term of ten years from March 1, 1967 to March 1, 1977 and Otis Peterson is entitled to possession of said land under said lease.

Although the land described in said Exhibits "C" and "C-1" was in 1867 a part of the Omaha Indian Reservation to which the United States held title for the use and benefit of the Omaha Tribe of Indians, said title was extinguished when said land ceased to exist when it was eroded away and washed down the river. These answering defendants deny each and every allegation of Paragraphs 11, 12, 13 and 14 of plaintiff's complaint not hereinabove admitted.

9. As an additional and separate defense these answering defendants allege that the defendant, RGP, Inc. and its predecessors in title have been in actual, open, notorious, exclusive, continuous and adverse possession of the lands described in paragraph 8 hereof under color or title for more than ten years (approximately forty years as alleged by plaintiff) prior to the assertion of any claim thereto by plaintiff, and the pertinent statute of limitations precludes plaintiff from effectively asserting any claim of title or interest in said property, and has extinguished any right, title or interest it might otherwise have had in said land.

10. As an additional and separate defense these answering defendants allege that prior to April 2, 1975, the

plaintiff had not contested the ownership and possession of said land by said defendants and their predecessors in title but had acquiesced in the same; that relying on the foregoing acquiescence of the plaintiff, defendant RGP, Inc. and its predecessors in title purchased said land from the apparent owners thereof, paid taxes on said land, cleared it of trees and otherwise prepared it for cultivation, constructed dikes and dug drainage ditches, all involving great expense to the defendant and its predecessors in title. Also, witnesses who had knowledge of the action of the Missouri River in the vicinity of the land described in Exhibits "C" and "C-1" attached to plaintiff's complaint and in paragraph 8 of this answer, and of what effect such action had with respect to said land, have died and, due to the delay by the plaintiff in asserting its claim, said witnesses are unavailable to testify. By reason of the foregoing the defendants will be greatly prejudiced if the plaintiff is permitted to assert its claim effectively at this time, and the plaintiff by reason of its laches is estopped from claiming or asserting any title it might otherwise have in said tracts described in paragraph 8 hereof or in any part thereof.

11. These defendants deny that the plaintiff is entitled to any judgment as claimed in plaintiff's complaint, and allege that the defendant, RGP, Inc. is entitled to a judgment quieting title in fee simple in it to the land described in paragraph 8 thereof as owned by it, and upholding its right to possession thereof as against the claims of the plaintiff and the Omaha Tribe of Indians but subject to the rights of the defendant, Otis Peterson, under his lease above described. The defendant, RGP, Inc. is entitled to an order declaring that the Omaha

Tribe of Indians has no right, title or interest in or to the lands described in paragraph 8 hereof, and no right to possession thereof.

(Answers to Claim Nos. II and III omitted in printing.)

WHEREFORE, these defendants pray that each and every prayer of plaintiff's complaint be denied, that plaintiff's complaint be dismissed, and that the Court award to these defendants their costs.

COUNTERCLAIM

For their counterclaim against the plaintiff these answering defendants allege as follows:

20. This Court has jurisdiction over this counterclaim by reason of Rule 24 (a) and Rule 13 (a) of the Federal Rules of Civil Procedure.

21. These defendants adopt and incorporate herein by this reference the allegations in their foregoing answer to plaintiff's complaint.

WHEREFORE, these defendants pray that judgment be entered as follows:

(a) Setting aside the order of this Court in cases, C 75-4024 and C 75-4026, both now consolidated herewith, granting plaintiff's application for preliminary injunction; dissolving the preliminary injunction heretofore issued by this Court; and granting a preliminary injunction to these defendants herein enjoining and restraining the plaintiff, Omaha Indian Tribe, its individual members, agents, employees, and other persons acting under or by their direction, from interfering with the possession and use of the

lands described in paragraph 8 hereof by these answering defendants until the rights of the parties to this action have been finally determined by this Court.

(b) For a judgment quieting title to the land described in paragraph 8 hereof in the defendant, RGP, Inc. in fee simple; declaring that the plaintiff, the Omaha Tribe of Indians, and its members, have no right, title or interest in said described land or any part thereof; and enjoining the plaintiff, its agents, employees, members and other persons acting under their direction, from asserting title to such lands and from interfering in any way with the possession, use and occupancy of said land by defendant, RGP, Inc. and their lessees and assigns.

(c) For such other relief as the Court may find justified and for the costs of this action.

PETERS, CAMPBELL &
PEARSON, P.C.

By /s/ Peter J. Peters
233 Pearl Street
Council Bluffs, Iowa 51501

*Attorneys for Defendants RGP, INC.
and Otis Peterson*

(Proof of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

HAROLD SORENSON, HAROLD M. SORENSON,
LUEA SORENSON AND DARRELL L.
SORENSON, et al.,

Defendants.

ANSWER AND COUNTERCLAIM

(Filed February 12, 1976)

COME NOW the defendants, Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson and in this their answer to plaintiff's complaint, respectfully states to the Court:

CLAIM NO. I

1. Defendants deny paragraph 1.
2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3 and 4, and therefore deny the same.
3. Defendants admit the first sentence of paragraph 5 but deny the remainder of the paragraph.
4. Defendants deny paragraph 6.
5. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 7, 8, 9 and 10, and therefore deny the same.
6. Defendants deny paragraphs 11, 12, 13 and 14.

WHEREFORE, these defendants pray that plaintiff's first claim be dismissed as to these defendants at plaintiff's costs.

(ANSWER TO CLAIM NO. II AND CLAIM NO. III
omitted in printing.)

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state a cause of action upon which relief can be granted.
2. This court lacks jurisdiction of the subject matter.
3. Plaintiff should be denied relief because its claims are barred by the statute of limitations.
4. Plaintiff should be denied relief because it has acquiesced in the possession and ownership of these defendants in the land which is claimed adversely to these defendants.
5. Plaintiff should be denied relief because it is guilty of laches.
6. Plaintiff should be denied relief because its claims are barred by the doctrine of estoppel.
7. Plaintiff should be denied relief because it has abandoned its claims set out in its complaint.
8. Plaintiff should be denied relief because plaintiff has so long delayed its claim to this land and has not come into the court with clean hands.
9. Plaintiff should be denied relief for the reason that granting the same would deprive these defendants of their property without due process of law, and deny these defendants of equal protection of the laws.

WHEREFORE, these defendants pray that plaintiff's complaint be dismissed in its entirety at plaintiff's costs.

(COUNTERCLAIM I omitted in printing)

COUNTERCLAIM II

COMES NOW the defendant, Harold M. Sorenson, counterclaimant, and states to the court:

1. That at all times material hereto he was and is the owner of certain real estate more particularly described in Exhibit "Sorenson A" attached hereto and by this reference made a part hereof.
2. That this counterclaimant denies that the plaintiff, or any of the defendants named herein, have any valid right, title, interest or estate in or to any of the above described lands and alleges that any adverse claim of the plaintiff or any of the defendants is illegal, invalid, void and without merit.
3. That your counterclaimant, Harold Sorenson, is entitled to judgment by this court against the plaintiff and against all other defendants, and each of them, declaring, determining, and quieting title in and to the lands above described in this counterclaimant, Harold Sorenson, and denying each and every adverse claim of the plaintiff and all other defendants, and is entitled to judgment and decree continuing and restoring to him full, peaceful and quiet possession of said lands.

WHEREFORE, your counterclaimant, Harold M. Sorenson, prays this court for entry of a judgment in his favor determining, declaring, and quieting title in him to the lands described in this counterclaim, and forever restraining and enjoining the petitioner and all other defendants herein and each of them from claiming or asserting any right, title, interest or estate in and to said lands, and further for the costs of this action.

COUNTERCLAIM III

COME NOW the defendants, Harold Sorenson and Luea Sorenson, husband and wife, counterclaimants, and state to the court:

1. That at all times material hereto they were and are the owners of certain real estate more particularly described in exhibit "Sorenson B" attached hereto and by this reference made a part hereof.

2. That these counterclaimants deny that the plaintiff, or any of the defendants named herein, have any valid right, title, interest or estate in or to any of the above described lands and allege that any adverse claim of the plaintiff or any of the defendants is illegal, invalid, void and without merit.

3. That these counterclaimants, Harold Sorenson and Luea Sorenson, husband and wife, are entitled to judgment by this court against the plaintiff and against all other defendants, and each of them, declaring, determining and quieting title in and to the lands above described in these counterclaimants, Harold Sorenson and Luea Sorenson, husband and wife, and denying each and every adverse claim of plaintiff and all other defendants, and are entitled to judgment and decree continuing and restoring to them full, peaceful and quiet possession of said land.

WHEREFORE, your counterclaimants, Harold Sorenson and Luea Sorenson, husband and wife, pray this court for entry of a judgment in their favor determining, declaring and quieting title in them to the land described in this counterclaim, and forever restraining the plaintiff and all other defendants herein, and each of them, from claiming

or asserting any right, title, interest or estate in and to said land, and further for the costs of this action.

COUNTERCLAIM IV

COMES NOW the defendant, Darrell L. Sorenson, counterclaimant, and states to the court:

1. That at all times material hereto he was and is the owner of certain real estate more particularly described in exhibit "Sorenson C" attached hereto and by this reference made a part hereof.

2. That this counterclaimant denies that the plaintiff, or any of the defendants named herein, have any valid right, title, interest or estate in or to any of the above described lands and alleges that any adverse claim of the plaintiff or any of the defendants are illegal, invalid, void and without merit.

3. That your counterclaimant, Darrell L. Sorenson, is entitled to judgment by this court against the plaintiff and against all other defendants, and each of them, declaring, determining, and quieting title in and to the lands above described in this counterclaimant, Darrell L. Sorenson, and denying each and every adverse claim of the plaintiff and all other defendants, and is entitled to judgment and decree continuing and restoring to him full, peaceful and quiet possession of said lands.

WHEREFORE, your counterclaimant, Darrell L. Sorenson, prays this court for entry of a judgment in his favor determining, declaring and quieting title in him to the lands described in this counterclaim, and forever restraining and enjoining the petitioner and all other defendants herein and each of them from claiming or asserting any right,

title, interest or estate in and to said lands, and further for the costs of this action.

/s/ Maurice B. Nieland

300 Toy National Bank Building
Sioux City, Iowa 51101

*Attorney for Defendants Harold
Sorenson, Harold M. Sorenson, Luea
Sorenson and Darrell L. Sorenson*

(Certificate of service and Exhibits A, B and C
omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4067

OMAHA TRIBE OF NEBRASKA,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT
COMPANY, et al.,

Defendants.

REPLY TO COUNTERCLAIM OF ROY TIBBALS
WILSON, HAROLD JACKSON, CHARLES E.
LAKIN, AND FLORENCE LAKIN,

(Filed March 9, 1976)

COMES NOW, the Omaha Tribe of Nebraska, and in
reply to Counterclaim of Roy Tribbals Wilson, Harold
Jackson, Charles E. Lakin, and Florence Lakin, respect-
fully states to the Court as follows:

1. The Omaha Indian Tribe in answer to Paragraph
20 denies each and every allegation contained in the afore-
said Paragraph 20.

2. The Omaha Indian Tribe denies each and every
allegation contained in Paragraph 21.

WHEREFORE, the Omaha Indian Tribe prays Judg-
ment against the above-named Defendants and Counter-
claimants, Roy Tribbals Wilson, Harold Jackson, Charles
E. Lakin and Florence Lakin, all in accordance with the
Complaint filed herein by the Omaha Indian Tribe on or
about October 6, 1975.

O'BRIEN, GALVIN & O'BRIEN

By: /s/ John T. O'Brien

916 Grandview Blvd.
Sioux City, Iowa

Attorneys for Tribe.

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

HAROLD SORENSON, HAROLD M. SORENSON.
LUEA SORENSON AND DARRELL L.
SORENSON, et al.,

Defendants.

REPLY TO ANSWER AND COUNTERCLAIM OF
DEFENDANTS HAROLD SORENSON, HAROLD
M. SORENSON, LUEA SORENSON, AND
DARRELL L. SORENSON

COMES NOW, the Omaha Indian Tribe, Plaintiff herein, and in reply to the Affirmative Defenses in the Answer filed by Harold Sorenson, Harold M. Sorenson, Luea Sorenson, and Darrell Sorenson, in this cause respectfully states as follows:

1. The Plaintiff denies the allegations contained in Paragraph 1 of the Affirmative Defenses.
2. The Plaintiff denies the allegations contained in Paragraph 2 of the Affirmative Defenses.
3. The Plaintiff denies the allegations contained in Paragraph 3 of the Affirmative Defenses.
4. The Plaintiff denies the allegations contained in Paragraph 4 of the Affirmative Defenses.
5. The Plaintiff denies the allegations contained in Paragraph 5 of the Affirmative Defenses.
6. The Plaintiff denies the allegations contained in Paragraph 6 of the Affirmative Defenses.
7. The Plaintiff denies the allegations contained in Paragraph 7 of the Affirmative Defenses.
8. The Plaintiff denies the allegations contained in Paragraph 8 of the Affirmative Defenses.
9. The Plaintiff denies the allegations contained in Paragraph 9 of the Affirmative Defenses.

WHEREFORE, this Plaintiff renews the prayer of its Complaint.

REPLY TO COUNTERCLAIM I

COMES NOW, the Omaha Indian Tribe, Plaintiff herein, and replies to the Counterclaim filed by Defendants Harold Sorenson, et al and avers and alleges and denies as follows:

REPLY TO COUNTERCLAIM I

1. The Omaha Indian Tribe moves to dismiss the alleged Counterclaim I on the grounds that the \$2,000 prayed for in said Counterclaim has been paid to the Attorney for the Counterclaimant and receipt has been acknowledged.

WHEREFORE, the Omaha Indian Tribe renews the prayer of its Complaint as against the Defendants herein and further prays that they be denied any relief on this Counterclaim.

REPLY TO COUNTERCLAIM II

In reply to Counterclaim II, the Omaha Indian Tribe, Plaintiff herein, incorporates by reference the Complaint filed herein by the Omaha Indian Tribe on October 6, 1975.

1. The Omaha Indian Tribe, Plaintiff herein, denies Paragraph 1 of Counterclaim II.
2. The Omaha Indian Tribe, Plaintiff herein, denies the allegations contained in Paragraph 2 of Counterclaim II.
3. The Omaha Indian Tribe, Plaintiff herein, denies the allegations contained in Paragraph 3 of Counterclaim II.

WHEREFORE, the Omaha Indian Tribe renews the prayer of its Complaint as against the Defendants herein

and further prays that they be denied any relief on this Counterclaim.

REPLY TO COUNTERCLAIM III

In reply to Counterclaim III, the Omaha Indian Tribe, Plaintiff herein, incorporates by reference the Complaint filed herein by the Omaha Indian Tribe on October 6, 1975.

1. The Omaha Indian Tribe, Plaintiff herein, denies the allegations contained in Paragraph 1 of Counterclaim III.

2. The Omaha Indian Tribe, Plaintiff herein, denies the allegations contained in Paragraph 2 of Counterclaim III.

3. The Omaha Indian Tribe, Plaintiff herein, denies the allegations contained in Paragraph 3 of Counterclaim III.

WHEREFORE, the Omaha Indian Tribe renews the prayer of its Complaint as against the Defendants herein and further prays that they be denied any relief.

REPLY TO COUNTERCLAIM IV

In reply to Counterclaim No. IV, the Omaha Indian Tribe, Plaintiff herein, incorporates by reference the Complaint filed herein by the Omaha Indian Tribe on October 6, 1975.

1. The Plaintiff denies the allegations contained in Paragraph 1 of Counterclaim IV.

2. The Plaintiff denies the allegations contained in Paragraph 2 of Counterclaim IV.

3. The Plaintiff denies the allegations contained in Paragraph 3 of Counterclaim IV.

WHEREFORE, the Omaha Indian Tribe renews the prayer of its Complaint as against the Defendants herein and further prays that they be denied any relief on this Counterclaim.

O'BRIEN, GALVIN & O'BRIEN

By: /s/ John T. O'Brien

916 Grandview Blvd.

Sioux City, Iowa 51101

Attorney for Tribe.

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants.

NO. C 75-4026

OMAHA INDIAN TRIBE, etc.,

Plaintiff,

vs.

HAROLD JACKSON, et al.,

Defendants.

NO. C 75-4067
 OMAHA INDIAN TRIBE, et al.,
Plaintiffs,
 vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT
 COMPANY, et al.,
Defendants.

REPLY TO COUNTERCLAIM OF DEFENDANTS
 R. G. P., INC., AND OTIS PETERSON

(Filed August 12, 1976)

COMES NOW, the Omaha Indian Tribe, Plaintiff herein, and replies to the Counterclaim filed by R.G.P., INC. and OTIS PETERSON, Defendants, as follows:

1. The Defendants OTIS PETERSON and R.G.P., INC. filed their Answer and Counterclaim subsequent to this Court's Order dated April 5, 1976, wherein this Court, among other things, under the heading of "Motion for Partial Summary Judgment" Pages 5-6 made this Ruling, " * * * State statutes of limitation cannot affect adverse possession of lands held in Trust by the United States for the benefit of Indian Tribes. Similarly, State Rules of Laches, Estoppel, or Abandonment, have no applicability to the title disputes in the instant action."

2. Irrespective of this Court's Ruling on April 5, 1976, denying the availability of the affirmative defenses of Statutes of Limitations, Estoppel, Laches and related defenses as against the Omaha Indian Tribe, the Defendants OTIS PETERSON and R.G.P., INC., in Paragraph 10 and Paragraph 11 of their Answer and Counterclaim interpose those defenses and adhere to the concepts throughout their answering Counterclaim that in some

manner their claim to the Omaha Tribe, Plaintiff herein, could be denied on the basis of Statute of Limitations, Estoppel and related defenses.

3. By way of "Counterclaim" the Defendants OTIS PETERSON and R.G.P., INC. by reference have incorporated all of the allegations in their Answer as a basis upon which their Counterclaim is predicated without indicating the concept upon which those Motions for Counterclaim are predicated, and they pray for an Injunction against the Omaha Indian Tribe to prevent them from interfering with the alleged possession of the Defendants, OTIS PETERSON and R.G.P., INC and request the Court to declare that fee simple title reside in those Defendants.

4. The Omaha Indian Tribe, Plaintiff denies each and every allegation contained in the Answer and Counterclaim filed by the aforesaid Defendants, OTIS PETERSON and R.G.P., INC.

O'BRIEN, GALVIN & O'BRIEN
 By: /s/ John T. O'Brien

922 Douglas Street
 Sioux City, Iowa 51101

*Attorneys for Omaha Tribe
 of Nebraska.*

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ROY TIBBALS WILSON, et al.,
Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,
vs.

HAROLD JACKSON, et al.,
Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, etc.,
Plaintiff,
vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT
COMPANY, et al.,
Defendants.

ORDER

(Filed April 5, 1976)

This matter is before the court on the following motions: -

(Listing and discussion of a number of categories of motions omitted in printing.)

MOTIONS TO DISMISS

Numerous defendants in No. C 75-4067 move to dismiss on the ground that no claim is stated because it appears upon the face of the complaint that all claims alleged are barred by the pertinent Iowa statute of limitations, § 614.1 (5), Code of Iowa (1975). It is the court's view that the motion is not well taken.

Even assuming Iowa law to be applicable on this issue, the Iowa high court has consistently held that the doctrine of adverse possession as governed by the statute does not effect a change of title against governmental bodies so as to prevent the exercise of their governmental functions. *E. g., Twining v. City of Burlington*, 68 Iowa 284, 27 N. W. 243 (1886); *Johnson v. City of Shenandoah*, 153 Iowa 493, 133 N. W. 761 (1911); *Sioux City v. Betz*, 232 Iowa 84, 4 N. W. 2d 872 (1942). Here the United States is a named party in one action and has a governmental interest in protecting the title of all lands held in trust for an Indian tribe pursuant to treaty. *See Heckman v. United States*, 224 U. S. 413, 437-438, 32 S. Ct. 424, 56 L. Ed. 820 (1912).

Furthermore, plenary control over tribal rights to Indian lands became the exclusive province of Federal law upon adoption of the Constitution. *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661, 667, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974). The primacy of Federal law has been asserted through the Non-intercourse Act of 1790, 1 Stat. 137, and its successors, now codified at 25 USC § 177.

The latter statute provides *inter alia*:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any

Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

If title to tribal lands is not alienable by the Indians, *a fortiori* title cannot be obtained against them by adverse possession. *United States v. Schwartz*, 460 F.2d 1365, 1371-1372 (7th Cir. 1972); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422-423 (4th Cir. 1938).

Initially, the court finds that the interests of judicial convenience and economy are not being served by consolidation of these three cases *in toto*. The posture of No. C 75-4067 is hindering an orderly and efficient administration of justice in the other two cases, wherein the parties, issues and boundaries of the controverted lands are more clearly in focus. Therefore, trial of all issues relating to lands in No. C 75-4067 which are not also within the subject res of Nos. C 75-4024 and C 75-4026, and all issues of damages, will be severed. Cases Nos. C 75-4024 and C 75-4026 will remain consolidated with each other and with the portion of No. C 75-4067 relating to the identical subject res.

Ruling on the motion to strike jury trial demand will be reserved with respect to the severed portion of No. C 75-4067. The other two cases, and the quiet title issues in No. C 75-4067 relating to the identical lands in the Blackbird Bend region, are equitable in nature. The Tribe has possession of these lands.² An action to quiet title

² In its ruling on the motion for preliminary injunction, the court resolved the issue of the status quo by ruling that the Indians were then in possession under a claim of title.

and obtain injunctive relief by a party in possession is equitable, for which a jury trial is not required. *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705, 718 (5th Cir. 1951), *cert. denied*, 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 687; *United States v. Mulligan*, 177 F.Supp. 384, 386 (D. Ore. 1959); *cf. Zunamon v. Brown*, 418 F.2d 883, 887-889 (8th Cir. 1969). Plaintiffs' motions to strike jury trial demand will be granted with respect to these consolidated cases.

Motion for Partial Summary Judgment

Plaintiff Tribe moves for summary judgment on several issues raised by way of affirmative defenses in the answers of certain defendants. Summary judgment is appropriate only where no genuine issues of material fact remain unresolved and the movant is clearly entitled to judgment as a matter of law. Rule 56, FRCP; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *Chicago & Northwestern Ry. Co. v. Hospers Packing Co., Inc.*, 363 F.Supp. 697 (N.D. Ia. 1973). Here defendants have failed to file any resistance generating factual issues as required by Rule 56(e), FRCP, and it appears that the issues remaining on these defenses are largely questions of law.

The court has previously indicated that it has subject matter jurisdiction over these actions, 28 USC §§ 1331, 1345, 1362, and plaintiffs' motion is granted on this issue. It is also the court's view that the complaints do state a cause of action, and the motion will also be granted on this issue.

With respect to those issues listed in subparagraphs c-h, summary judgment is appropriate as a matter of law

only with respect to the establishment of title aspects and not on the damages issues. As stated above, state statutes of limitations cannot effect adverse possession of lands held in trust by the United States for the benefit of Indian tribes. Similarly, state rules of laches, estoppel, or abandonment have no applicability to the title dispute in the instant action. *United States v. Schwarz, supra* at 1372. Summary judgment will be granted to the extent indicated above, and denied in all remaining respects.

April 5, 1976.

/s/ Edward J. McManus, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

Nos. 77-1384 and 77-1387

OMAHA INDIAN TRIBE etc.
and UNITED STATES OF AMERICA,

Appellants,

vs.

ROY TIBBALS WILSON, et al.,

Appellees.

Appeals from the United States District Court for the
Northern District of Iowa

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 2, 1978.

SUPREME COURT OF THE UNITED STATES

No. 78-160

Roy Tibbals Wilson, et al.,

Petitioners,

vs.

Omaha Indian Tribe, et al.

ORDER ALLOWING CERTIORARI. Filed November
13, 1978.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, limited to questions 2 and 3 presented by the petition. The case is consolidated with No. 78-161 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 78-161

Iowa, et al.,

Petitioners,

vs.

Omaha Indian Tribe, et al.

ORDER ALLOWING CERTIORARI. Filed November 13, 1978.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, limited to questions 1 and 4 presented by the petition. The case is consolidated with No. 78-160 and a total of one hour allotted for oral argument.

An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. Approved June 30, 1834.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

SEC. 2. *And be it further enacted,* That no person shall be permitted to trade with any of the Indians (in the Indian country) without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with

one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be the duty of the persons granting or revoking such licenses, forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.

SEC. 3. *And be it further enacted,* That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country, or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the superintendent, to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all ap-

plications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

SEC. 4. *And be it further enacted*, That any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.

SEC. 5. *And be it further enacted*, That no license to trade with the Indians shall be granted to any persons except citizens of the United States: *Provided*, That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.

SEC. 6. *And be it further enacted*, That if a foreigner shall go into the Indian country without a passport from the War Department, the superintendent, agent, or sub-agent of Indian affairs, or from the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

SEC. 7. *And be it further enacted*, That if any person other than an Indian shall, within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in

hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.

SEC. 8. *And be it further enacted*, That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.

SEC. 9. *And be it further enacted*, That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

SEC. 10. *And be it further enacted*, That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

SEC. 11. *And be it further enacted*, That if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by mark-

ing trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

SEC. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless*, That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

SEC. 13. *And be it further enacted*, That if any citizen or other person residing within the United States or the territory thereof, shall send any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction

of any treaty or other law of the United States, or to disturb the peace and tranquility of the United States, he shall forfeit and pay the sum of two thousand dollars.

SEC. 14. *And be it further enacted*, That if any citizen, or other person, shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, knowing the contents thereof, he shall forfeit and pay the sum of one thousand dollars.

SEC. 15. *And be it further enacted*, That if any citizen or other person, residing or living among the Indians, or elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.

SEC. 16. *And be it further enacted*, That where, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured,

a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment, out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also*, That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

SEC. 17. *And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian

affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the meantime, in respect to the property so taken, stolen or destroyed, the United States guaranty, to the party so injured, an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That, unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

SEC. 18. *And be it further enacted*, That the superintendents, agents, and sub-agents, within their respective districts, be, and are hereby, authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the two preceding sections of this act, and to administer an oath to the deponents.

SEC. 19. *And be it further enacted*, That it shall be the duty of the superintendents, agents, and sub-agents, to endeavor to procure the arrest and trial of all Indians

accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of the United States to be employed in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes.

SEC. 20. *And be it further enacted*, That if any person shall sell, exchange, or give, barter, or dispose of, any spirituous liquor or wine to an Indian, (in the Indian country,) such person shall forfeit and pay the sum of five hundred dollars; and if any person shall introduce, or attempt to introduce, any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any such spirituous liquor or wine is found, the

goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.

SEC. 21. *And be it further enacted*, That if any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or continued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.

SEC. 22. *And be it further enacted*, That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

SEC. 23. *And be it further enacted*, That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every

person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and him immediately to convey from said Indian country, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court-martial shall direct.

SEC. 24. *And be it further enacted*, That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri; west, by the Mexican possessions; south, by Red river; and east, by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri; and for the pur-

pose aforesaid, the several portions of Indian country east of the said Mississippi river, shall be, and are hereby, severally annexed to the territory in which they are situate.

SEC. 25. *And be it further enacted*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

SEC. 26. *And be it further enacted*, That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territories, such offenders may be there apprehended, and transported to the territory or judicial district having jurisdiction of the same.

SEC. 27. *And be it further enacted*, That all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (if any state or territory in which the defendant shall be arrested or found,) the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SEC. 28. *And be it further enacted*, That when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf

of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

SEC. 29. *And be it further enacted*, That the following acts and parts of acts shall be, and the same are hereby, repealed, namely: An act to make provision relative to rations for Indians, and to their visits to the seat of government, approved May thirteen, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine, eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen; an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force

for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other purposes," (a) approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Arkansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four; the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a sub-agent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however*, That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also*, That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

SEC. 30. *And be it further enacted*, That until a western territory shall be established, the two agents for

the Western territory, as provided in the act for the organization of the Indian department, this day approved by the President, shall execute the duties of agents for such tribes as may be directed by the President of the United States. And it shall be competent for the President to assign to one of the said agents, in addition to his proper duties, the duties of superintendent for such district of country or for such tribes as the President may think fit. And the powers of the superintendent at St. Louis, over such district or tribes as may be assigned to such acting superintendent, shall cease: *Provided*, That no additional compensation shall be allowed for such services.

APPROVED, June 30, 1834.

(R. 145) ELMER M. CLARK,

a witness called on behalf of the Plaintiff Omaha Tribe, being first duly sworn, was examined and testified on his (R. 146) oath as follows:

Direct Examination

By Mr. Veeder:

Q. Mr. Clark, would you state your full name into the record?

A. Elmer M. Clark.

Q. And where do you reside, Mr. Clark?

A. Denver, Colorado.

Q. When were you born, Mr. Clark?

A. August 31, 1917.

Q. And what is your present profession and occupation?

A. I am a land and aerial surveyor.

Q. How long have you been engaged in that activity, Mr. Clark?

A. Since service in the Marine Corps in 1944, sir.

* * *

A. I am licensed in seven states as a professional land surveyor; the states being: Utah, Arizona, New Mexico, Colorado, Wyoming, Montana and Iowa.

* * *

(R. 277) Q. What investigation did you make in the ground, from the standpoint of both 98 and 98-A, to correlate those two exhibits with the cadastral survey as prepared by Anderson, and which plats are in the record? Would you go on the ground and relate those with the cadastral survey, please?

A. Yes. I have walked portions of this high bank along the—cut through Sections 28 and 34, and particularly on down into Section 33, Township 84 North, Range 46 West, and have examined, not only the high bank, but the remains of the channels or abandoned channels that are still there today.

* * *

(R. 291) Q. Please refer to the exhibit when you are speaking, Mr. Clark.

A. On Exhibit 98. The area instead of being a large backwater then shows very plainly two channels

and possibly a third, which would be outside or easterly and northeasterly of the main river of the Missouri River.

These channels are the result of at least one and possibly two or more avulsions as the river made a point bar cut-off—I believe that is the correct term—from the 1875 channel to the present 1879 channel.

Now, in addition to this, this drawing cross-section for Station A-4800—48—which is a cross-section on the 1879 Missouri River map showing the river soundings running across this area—

. . .

(R. 695) By Mr. Cullison:

Q. Now, is there anything on this map that identifies anything as being center of old channel?

A. Yes. These soundings taken across on Station A-48 go in a southeasterly direction, and that shows a depth of twenty feet for the main thalweg or the main navigation channel for the 1879 river. If you continue in a southeasterly direction these depths go down—reduce to as little as one foot, which is shown here. Then the soundings become deeper and deeper, and in the part, against the Iowa bank in section, the north part (R. 696) of Section 4 is another channel which is twenty feet deep. Then you go back up, then these soundings continue back up to the bank.

Q. There's nothing on this map, exhibit whatever it is, 29, that says that that is an old channel; is there?

A. It is not labeled, but it is an obvious old channel.

Q. But it is your opinion that is an old channel; is that right?

A. It certainly is, because it is as deep as the main channel.

Q. And this designation here is your opinion, old channel?

A. Yes. Based on thorough study of the area and many years experience.

. . .

(R. 717) Q. Could you tell us how you were able to draw in the remaining blue areas and obtain those shapes and forms that you did on 98 and 98-A?

A. Starting on the Iowa bank, high bank, which would be the left bank of the Missouri River, going through Sections 28, 33 and 34, the Missouri River Commission map does outline that exterior high bank to the east.

That high bank is related or can be identified and the 1879 map follows the contours of the present-day high bank.

The second feature coming back inward, which cuts across, starting in Section 17, Township 24 North, Range 11 East, and running southeasterly is also marked on the 1879 map. The left or most easterly limb of that line is marked.

. . .

(R. 718) Q. Is that all you used?

A. Yes. I related to the present-day topography and the older records, which show those two channels specifically.

Q. Well, I understand that you could identify the edge of the bank as it is shown in 1879 and the edge of a bar that is shown in 1879, but how do you get from that to this water formation which you show in the right portion of Exhibits 98 and 98-A?

A. Because the 1870—correction—1890 map identified or the map—those two channels in that matter—in the manner and those channels are still in existence today.

. . .

(R. 3123) Q. And based upon your personal observation and based upon your long years of experience as a cadastral engineer, is it possible for you to state the criterion or the criteria that you utilized in determining the abandoned bed of a stream as it relates to the surrounding terrain and soils and related substances in which the (R. 3124) abandoned bed is found?

A. Yes, I can.

. . .

The Court: He said there was no testimony. I am overruling the objection.

You may make your answer.

The Witness: I have located and defined the boundaries of properties and abandoned river channels before

by observing, locating, measuring the width and size or dimension of these abandoned channels and observing the water levels and elevations.

By Mr. Veeder:

Q. What has your investigation revealed in regard—do you (R. 3125) have the exhibit there?

Mr. Peters: I do.

By Mr. Veeder:

Q. What has your investigation revealed in regard to the northerly high bank in the area, as you have set it forth, as it relates to the toe of that northerly high bank?

A. The Corps of Engineers' maps for 1927 and '28, which is Tribe Exhibits 36 and 27, show a series of lakes and marshes adjacent to and at the base or at the foot of the present Iowa northern high bank.

Q. Now, what did that investigation reveal in connection with the kind and type of deposition that you found in the bed of that stream?

A. I have walked the area with Dr. Robinson and observed the change in soil types from point bar deposits to the channel fill-type of deposits and have measured on the maps and the aerial photographs the width of the stream along the high bank.

Q. What did those determinations reveal, based upon your personal investigations and research?

A. They showed the Missouri River—the main channel of the Missouri River—was against that high bank at one time.

. . .

(R. 3128) The Court: Now, you can answer the question.

A. I was on the ground and observed the surface soils and I reviewed Dr. Robinson's material or the reports of his samples and could identify the difference between the channel fill and point bar deposits.

Q. Based upon your investigations and determinations as a cadastral surveyor, the man who placed these locations previously, were you able to make a determination as to the kind and type of soils that were against the bank?

A. Yes.

Q. What did you find them to be—

A. In the area—

Q. —the toe of the Bank?

A. —along adjacent to the toe of the bank was in the marsh areas—labelled marsh and lakes—are channel fill deposits, typical.

. . .

(R. 3129) Q. What did you find there?

A. I found the channel fill deposits, which would be a very fine soil, bordering on being a clay almost.

Q. Now, have you an opinion, based upon investigations that you made, as to the kind and type of soils that you encountered, the fact of the present location of the northerly high bank as it relates to the 1912 bank, as depicted on Wilson Q-8, and Wilson L-4—if my memory serves me correctly—have you an opinion as to the

phenomenon or forces that were involved when the Missouri River departed from that bank?

A. Yes.

Q. Is it your opinion that the Missouri River departed on the—left that bank on the basis of accreting to it or by sudden and abrupt change, all based upon your investigations?

. . .

(R. 3130) By Mr. Veeder:

Q. State in your opinion as to—based upon all your investigation—as to when the Missouri River departed from the northerly high bank, as you have described it?

. . .

The Court: Overruled.

The Witness: Subsequent to 1912, the main channel of the Missouri River abruptly, suddenly left its channel; that is, along the base what is now known as the northerly Iowa or Iowa northerly high bank.

By Mr. Veeder:

Q. Based upon your investigations and the statements that preceded that; that is, your review and investigations and on-the-ground personal investigations, do you have an opinion as to whether the Missouri River left that high bank by accretions?

Mr. Peters: That's objected to as leading and suggestive; no proper and sufficient foundation.

The Court: Overruled.

The Witness: It did not leave by accretion.

. . .

(R. 783) CHARLES S. ROBINSON,

a witness called on behalf of the Plaintiff, Omaha Tribe, being first duly sworn, was examined and testified on his oath as follows:

Direct Examination

By Mr. Veeder:

Q. Will you state into the record, Dr. Robinson, your full name and address?

A. Charles S. Robinson, 5265 McIntyre, Golden, Colorado.

Q. How old are you, Dr. Robinson?

A. Fifty-six.

Q. Would you state into the record your present employment or by whom you are employed?

A. I am a consulting geologist specializing in engineering and mining geology and geo-hydrology, geological engineer and I am self-employed, sole proprietorship.

Q. Were you in the Court Room when Elmer Clark testified?

Yes.

. . .

(R. 925) Q. Based upon your knowledge of river morphology, would you explain that phenomena, the extended meander lobe and the constriction near the center of it?

A. The river has continued — the river did continue to erode its eastern and high bank as it had started — as we have records starting in 1852. The main stream of the river had continued to extend itself eastward.

The river could not move southward because of the erosion resistant bank along the south limb of it and the force of the river has been—well, it's been directed farther and farther east. It's getting so that the river has to go around tighter and tighter bends as the bend extends itself to the east and the river then as a result in part, started to erode along or about in the position of the previous—the high water channel, which had been shown on the 1856 Warren map and also as shown on the Exhibit 95, the 1867 Barrett Survey and the Macomb map.

The river began to take—to erode into this bank (R. 926) and to become or move closer to the southern limb of the meander lobe.

Q. Is that the classic course or metamorphosis of an oxbow or meander lobe of this character, Dr. Robinson?

A. Yes.

Q. Does that report to what is demonstrated at least to some degree on 87 and 88, which are the—that you explained in detail, the river morphology, is that right?

A. That's correct. We are having the northern limb of the river move away from the—its bank, but the south limb can't move.

And it's from a study of river morphology we can predict that something is about to happen. The river is out of balance with its environment and it's because of this resisted layer at the south that does not allow the classic of the wood where we have homogeneous materials throughout the river to move south.

. . .

(R. 927) Q. Now, Dr. Robinson, would you please turn to the Exhibit 96-A, which is a photograph, the aerial photograph of the extended meander lobe of the Blackbird Bend lobe.

Relate the physical phenomena as set forth on that aerial to the geologic depiction and description that you have just completed.

A. Exhibit 96-A, which is entitled "Tract 1, Blackbird Bend Area, 1875 Missouri River, High Water Mark," and the significant features shown in 1968, the outlines of the 1875 river, the Barrett line, and the Anderson Survey line are shown on the aerial photograph, 96-A, which is a photograph of the present-day topography.

The 1875 river fits into or is shown against the present-day high bank which is visible on the ground today in Iowa.

The 1875 river was confined or eroding at the time against this high eastern bank and that bank as shown on the ground today is a sculpture as a result of the 1875 river and its erosion.

* * *

(R. 929) *Further Direct Examination*

By Mr. Veeder:

Q. I am going to ask you, Dr. Robinson, to take each of these aerals, step to 96-A, and follow the perimeter of what we call the easterly high bank, utilizing those obliques, please.

A. Exhibit 96-B-4 is an oblique aerial photograph taken from a position approximately in the middle, or in

the (R. 930) south half of Section 33, Township 84 North, Range 46 West, and looking in a generally northeast—east by northeast direction. The photograph shows, you can identify the position of the photograph by the county road which makes the sharp bend very close to the common corner between Sections 23 and 27, 34 and 33 in Township 84 North, Range 46 West. Visible in the center foreground of the aerial photograph is the high bank, which is in existence today, the area along the line running obliquely along the southeast quarter of Section 23. And below that bank you can see a dark stretch or dark area which is the visual evidence of the old 1875 channel.

Q. Now, does that comport with what is disclosed on the aerial 96-A?

A. Yes, sir.

Q. Would you step up there and relate it also—Now, don't relate the photo; follow through the area that Mr. Peters was interrogating you about as to the old bed of the '67 river, would you, from the standpoint of continuity?

A. The '67 river lay north in this area, or lay north of the 1875.

Q. And further down and around, would you?

A. And came down through and around the outside of the (R. 931) Barrett meander survey.

* * *

(R. 978) A. Based chiefly upon the geologic mapping of the area. The 1875 high bank is a physical feature which is on the ground today.

The position of the channel occupied by the 1875 river can be identified today on the ground. The width of that river at the time of the abandonment—

Q. You are speaking of the '75 river?

(R. 979) A. 1875 river, yes. It can be determined by differences in materials, surficial materials on the surface of the earth on the ground today.

Q. Have you done that?

A. Yes, sir.

Q. On the ground?

A. Yes.

Q. And personally observed it?

A. Yes.

Q. And can you state in the record as your observation disclosed referring to the kind and type of deposits that are at the foot of that high bank, the width of the 1875 river?

A. The width of the 1875 river has—can be seen on ground today by the difference in deposits as approximately 800 feet.

Q. Now, predicated upon your soil analysis, both surficial and drilling, what were the distinguishing elements between the soils in the now abandoned channel and the right bank of that channel? What are the differences?

A. The material in the abandoned channel is principally clay, with a little sand and silt.

And if I may state, Tribe's Exhibit 91—

Q. Lift that up, would you?

A. —which is a sample labelled as channel fill was taken (R. 980) from the 1875 abandoned channel. It's organic rich clay material with a little sand and silt.

On the right bank of the 1875 river, which would be west of the river, the deposits are principally point bar deposits.

. . .

(R. 1002) Q. Would you move back so the Court can observe? Would you go around on the other side?

A. If I may repeat, extending from the northwest quarter of Section 28, Township 84 north, Range 46 west, diagonally across Section 28 across the northeastern most corner of Section 33, along the western boundary of Section 34, diagonally across the southeast corner of Section 33, all of Township 84 north, Range 46 west and, then, westward across the top of Section—northern end of Section 5 in Township 83 north, 46 west. That high bank which circumscribes the 1875 river is present and visible today.

Q. Would you state the phenomenon, the natural monuments and the physical phenomenon within that arch concerning which you just testified?

A. Below the high bank following the same arch are clay deposits which represent the water, but with clay deposits below that represent the position of the 1875 river channel. These clay deposits—clay soil can be identified on the surface ground today and can be fol-

lowed continuously except where man has altered it with artificial fill, completely around that arch to the position approximately at the northwest corner of Section 5, Township 84 north, Range 46 west.

• • •

(R. 3181) By Mr. Veeder:

Q. Now, from the standpoint of the open end of the 1875 river, what does that mean to you as a mapmaker, and he stipulated to your being an expert on that? Go ahead and state what that means.

A. They didn't know what happened to the west of that open end, the surveyors who prepared Exhibit 79.

Q. They did not observe it; did they?

A. They did not observe it.

Q. Would you also state, based upon the unmapped areas of Sections 29 and 30, whether it is possible to discern whether accretions attached to and became a part of that particular area? Is that possible to determine from that map?

(R. 3182) A. No, sir.

Q. Now, why is that?

A. It was not mapped at that time.

Q. So that you have a blank there at that time?

A. We have a blank. You have no geomorphic form. I have no evidence indicated on that map from which I could determine what the origin of that particular area was.

• • •

(R. 3194) Q. What kind and type of investigation did you make in connection with the actual investigation and determination of the location of the northern high bank as it exists today?

A. I personally have walked all along that high bank, and, of course, at the time of my investigations I had the U. S. Corps of Engineers' 1974 topographic map, so that I could identify my position and I could identify the present high bank and was able to establish that the present Iowa high bank is as depicted on those recent exhibits, the topographic maps.

• • •

(R. 3197) Mr. Veeder: And that's all I want to be sure of. You had the condition before, Your Honor, and I just wanted to clear it up. Now, Dr. Robinson, relating, again, to your investigations along the northerly high bank, what—based upon your soil surveys, based upon your analysis of the geology there, your drillings, the core analyses you have made working with Dr.—working with Mr. Elmer Clark in locations, will you state into the record whether in your opinion there has been an alluvion or (R. 3198) alluvium, whatever one you want to use, attached to the northerly high bank by action of the 1912 river or any other river?

A. No.

The Court: No, you will not state it?

The Witness: No, there has been no alluvion attached to the northern high bank.

Mr. Veeder: And based upon your investigations, Dr. Robinson, what—do you have an opinion as to the mode

and method that the phenomena of the departure of the 1912 plus river—how did that take place?

A. The 1912 plus river made a sudden and abrupt change from the position along the northerly high bank to a position somewhere to the south of the trees that are shown and taken from Tribe's Exhibit 105-A, and it was a sudden and abrupt change and that river had to move farther south in that change.

Q. Now, why do you say that, Dr. Robinson?

A. Had there been a slow and imperceptible movement of river eroding its banks—southern banks and depositing alluvium against the northern high banks, that erosion would have destroyed those trees which were there until—one group is still there, but the other one, the tree which is labeled as an age of 1909 was cut down recently. So, the river was in the position against the northern high bank (R. 3199) sometime after 1912, which is a younger date than the years for those trees of 1904 and 1909. It had to leave there by a sudden change which puts the river to the south of those trees and left this abandoned channel which is in evidence on the ground today.

Q. Now, what—you say there was no deposition of alluvium. What are the deposits that are presently at the foot of the lower high bank—the northern high bank—the northern high bank and the kind and type of deposits that are situated there today based upon your personal knowledge?

A. Based on personal knowledge which included drilling a series of holes down through the materials in

the surface, the material at the base of the northern high bank consists, principally of clay and silt with a few stringers of sand. Material which is typical of deposits that are found in oxbow lakes or abandoned channels. Channel fill deposits.

* * *

(R. 1721)

RAUL McQUIVEY

Q. And you have indicated that, as I recall, post-1906?

A. Yes.

Q. Now, Mr.—Dr. McQuivey, did you make any investigations at or near the foot of that high bank in making your soil investigations?

A. Yes. I drilled holes 46 and 45 in Section 19, Range 46 West, Township 84 North, and found those samples to be primarily made up of silt and clay. Again, we could only go a short depth in that area before we ran into the water table. But approximately ten to twelve feet we found silt clay.

* * *

(R. 1722) Q. Now, if you would just swing on down to the easterly bank, the extremity there, did you make similar investigations at the foot of that bank?

A. Yes, I did. Drill hole number two is just off the Section corner 28, 27, 33 and 34 of Township 84 North, Range 46 West, this far easterly hole. And that hole went to a depth of twenty feet. And we found nothing in that hole but silt and clay.

Q. And what was indicative to you in regard to your drilling (R. 1723) at the foot of the northerly bank and the easterly high bank respecting the occupants there—occupancy there of the Missouri River?

A. Yes. As I testified, one of the reasons for taking many of these holes was to determine if that was a major old channel. And indeed, the soil sample indicates that there was a deposit or deposition of approximately twenty feet of silt and clay.

. . .

(R. 1740) JUNE GEADELMANN,

having been called as a witness on behalf of the Defendants, having been first duly sworn, was examined and testified upon her oath as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name, please, Mrs. Geadelmann?

A. My name is June Geadelmann.

Q. And where do you live?

A. I live in Mapleton, Iowa.

Q. Do you hold some County office in Monona County?

A. Yes. I am County Auditor for Monona County.

. . .

(R. 1765) JACK VIRTUE,
the witness herein, being duly sworn, testifies as follows:

The Court: How do you spell your name?

The Witness: V-I-R-T-U-E.

(R. 1766) The Court: Thank you.

. . .

Direct Examination

By Mr. Smith:

Q. Would you state your name, please?

A. Jack V. Virtue.

Q. And where do you live, Mr. Virtue?

A. Onawa, Iowa.

. . .

(R. 1937) By Mr. Veeder:

Q. Mr. Virtue, in light of your background and history in connection with this area that is here involved, you have a direct and immediate and a monetary interest in the outcome of this litigation of Tribe vs. Lakin, Wilson, Iowa, et al.; you have a direct and (R. 1938) immediate and personal monetary interest in the outcome of the litigation entitled United States v. Lakin, Wilson, Iowa, et al.; right?

A. Yes.

Q. So it is important to you personally how this case is resolved?

A. Factually, I hope.

Q. What?

A. Factually, I hope.

Q. And monetarily?

A. Well, the land that I have an interest in is not worth that much. But it is a duck hunting spot.

Q. But don't you have certificates out in regard to abstracts of title and also certifications as to the correctness of surveys?

A. Yes.

Q. You do?

A. (Witness nodding head in an affirmative manner.)

Q. So what you have said covers it; you have a personal interest?

A. Yes.

Mr. Veeder: I have no further questions.

* * *

(R. 1955) Mr. Clear: M8 is the description contained in the deed between Charles Lakin and the State of Iowa?

The Witness: Yes.

Mr. Clear: And N8 is the description contained in the deed between the Petersons and who?

Mr. Cullison: Lakin—or Peterson—It is a quit claim deed of Peterson to the State of Iowa.

Mr. Clear: And the third is just—T8 is just a plain legal description?

Mr. Cullison: I'll state for the record that T8 is a copy of the legal description contained in the States' Answer and Counterclaim.

* * *

(R. 1957) Mr. Cullison: I wanted to show, first of all, the legal description of the land claimed by the State of Iowa in its Answer and Counterclaim. Exhibit 0 is for the purpose of displaying to the Court what parcel of land is involved. The functional legal description is contained in the Answer and Counterclaim of which T8 is a copy.

The Court: I see. Oh, I can see no prejudice to the interest of anyone to allow those in, so they will (R. 1958) be received.

Mr. Cullison: I have no further questions.

* * *

(R. 1966) RAYMOND L. HUBER,

after having been first duly sworn, was examined and testified as follows:

Direct Examination

* * *

(R. 2141) Q. All right. Now, taking a look at Tribe's Exhibit 105, which is the 1923 river, do you have an opinion, Mr. Huber, as to whether or not the land that is located from the northerly high bank to the south to

where the river is positioned in Section 23, 24 and 19 in Township 24 North, Ranges 10 and 11 East, whether or not that land is all accretion to the Iowa high bank?

Mr. Veeder: I object to the asking of the opinion. Go ahead if he has an opinion.

The Court: You can answer yes or no.

A. Yes, it is.

By Mr. Peters:

Q. Yes, you have an opinion?

A. Yes, I have an opinion.

Mr. Veeder: I object. No foundation whatever. This witness is not qualified to testify in this regard. I interpose objection of opinion under the circumstances.

The Court: Overruled.

* * *

(R. 2148) By Mr. Peters:

Q. If there was any remnant of the Barrett meander lobe as surveyed in 1967 still left—

The Court: 1867?

Mr. Peters: 1867, I'm sorry.

By Mr. Peters:

Q. —still left by 1928, would there be vegetation on the land forms that remain which would indicate that the land form was intact still, the remnant of the old meander lobe of the 1867 Barrett Survey?

A. You could identify it as such if it were high land, area of high land as equally high as the original high land

included in the Barrett Survey, or if it had timber on a high land area that was of equal height to the area occupied by the timber as shown on the Barrett Survey.

Q. From your examination of any of the maps that have been received in evidence in this case, do any of those maps show any symbols indicating vegetation that would be fifty-five or sixty years of age within the Barrett (R. 2149) meander lobe?

Mr. Veeder: I object to this, Your Honor. This witness is not qualified from the standpoint of any aged trees or vegetation. There is not a scintilla of evidence that he is qualified to answer this question.

The Court: Overruled. I will let him answer.

A. As of what date?

Q. As of 1928.

A. As of 1928?

Q. Or any of the maps prior to '28 for that matter that you have seen and examined.

A. No, sir. I can see no trees in there that would be of age sixty-five approximately, because it's mostly a willow area, sandy area, willows and timbers, scattered willows and brush. Scattered timbers and willows. And from the progress that we have noted on the previous maps as to how this is filled in, we could not have any vegetation, any trees of an age sixty-five.

Q. Because it was all washed away, wasn't it?

A. Yes, sir.

* * *

(R. 2208) By Mr. Veeder:

Q. Now, you were not, you are not a registered engineer, are you?

A. No, sir. That was not required at the time.

Q. Yes or no? Just yes or no.

A. I cannot answer all questions yes or no. I have to explain.

Q. Were you a registered engineer, yes or no?

Mr. Peters: Your Honor, I don't think the question imposed on the witness a requirement to answer yes or no unless the witness can answer yes or no.

The Court: I think it can, because on redirect if you wish to ask him whether or not it was required, (R. 2209) you are not a registered engineer number one; isn't that correct?

The Witness: I am not a registered engineer.

The Court: Go ahead.

By Mr. Veeder:

Q. You are not a registered land surveyor?

A. I am not.

Q. You are not a geologist?

A. I am not.

Q. Now, and you are not a topographer?

A. I am not.

Q. So as a matter of fact, your responsibilities as I perceive them related to building, may be only designing

some structures that related to the prevention of erosion along some of the banks; is that right?

Mr. Peters: Object to the form of the question. It's not a question, it's a statement of the questioner asking the witness to either agree or disagree with it. And it's improper in that form.

Mr. Veeder: I will rephrase it, Your Honor. I would like to move along.

The Court: All right. Rephrase it.

By Mr. Veeder:

Q. Your job was to design structures involved in the protection of banks, is that it?

(R. 2210) A. Over the entire reach of the river, yes, sir, under the Omaha District.

* * *

(R. 2298) Mr. Veeder: Well, once again I'll start again. We observe a channel directly east of 29 on U, isn't that right?

A. Yes, sir.

Q. And that channel extends the whole arch of the easterly high bank down to the thalweg as we perceive it just north of Section 5 of 83, 46, right?

A. Yes, sir.

Q. Now, is it not true that when waters are present there cannot be accretions across the water, is that not true? Now, the answer can be yes or no.

(R. 2299) A. Yes, there could be.

Q. Accretions across a body of water?

A. Certainly. If there is sediment carried in suspension it could be carried across this body of water and deposited over onto another bar on the other side.

• • •

Mr. Veeder: Now, let me ask you this question: Are you stating that in your understanding that accretions are of such character that when there is a backwater such as I'm pointing to that archs around the easterly high bank, that those depositions go in there and sink to the bed of the stream, the bed of the slough or whatever it is, now? Are you calling that accretions?

(R. 2300) A. That is deposition.

Q. Answer the question. Are you calling those accretions?

A. Yes, those are accretions.

Q. To the bed of the—to the bed of this slough?

A. Well, it is a deposition to the bed of the slough. Call it deposition or accretion, it is a building up of this slough next to the Iowa high bank in the high water period.

Q. And, then, we are looking at a situation where you have a separate bar which is totally separated, here, by this channel, are we not? I'm pointing to bar A with the easterly high bank in 28 and just a little smidgit left of 33 and down to 34?

A. We don't know that it is continuous, because it stops east of Section 29.

Q. But, as far as you can see it is continuous down here to 29, is it not?

A. That's right.

Q. And that was —that is the old 1875 channel, is it not?

A. It is.

Q. Yes. So, as a matter of fact, the bar as there depicted is totally separated in that area—as far as Exhibit U shows, it is totally separated by a body of water from the easterly high bank?

A. As shown on the map it is.

• • •

(R. 2024) HAROLD WIESE,

the witness herein, being duly sworn, testifies as follows:

Direct Examination

(R. 2325) By Mr. Burke:

Q. Could you give us your name and address?

A. Harold Wiese, Omaha, Nebraska.

Q. By whom are you employed?

A. LeDioyt Land Company.

Q. And are their headquarters in Omaha?

A. Yes.

Q. What is the nature of the work you do for them?

A. Farm management and farm sales.

Q. For how many years?

A. I have been in this nature of work for twenty some years.

Q. In that work did you do both farm management sales and appraisals?

A. Yes.

. . .

(R. 2342) *Cross-Examination*

By Mr. Veeder:

Q. Were you present when the Bureau of Indian Affairs and the Omaha Indian Tribe went into possession? Were you there yourself?

A. Not that exact day, but was in and out of the property at different times.

Q. You were not there when—

A. Not the exact time.

Q. Were you aware that the Bureau of Indian Affairs police accompanied the Omaha Indian Tribe?

A. I was not present at the time they walked onto the land.

Q. So you don't know.

A. Just notified they were.

Q. But you don't know—

A. And the signs. No.

Mr. Veeder: No more questions.

. . .

(R. 2343) HAROLD DARYL JACKSON,

a witness called on behalf of the Defendants, being first duly sworn, was examined and testified on his oath as follows:

Direct Examination

By Mr. Burke:

Q. Tell us your name and address.

A. Harold Daryl Jackson, 508 North 12th, Onawa, Iowa.

Q. Mr. Jackson, are you the tenant on the Wilson farm?

A. Yes, I am.

. . .

(R. 2346) OTIS PETERSON,

a witness called on behalf of the Defendants, being first duly sworn, was examined and testified on his oath as follows:

. . .

(R. 2372-A) CHARLES LAKIN,

a witness called on behalf of the Defendants, being first duly sworn, was examined and testified on his oath as (R. 2373) follows:

Direct Examination

By Mr. Berkshire:

Q. Will you state your name, please?

A. Charles Lakin.

Q. And where do you reside, Mr. Lakin?

A. 1217 North 98 Court, Omaha, Nebraska.

Q. And you are the same Charles Lakin as one of the Defendants in the action of the United States of America versus Charles Lakin, which is being tried in this Court, is that correct?

A. Yes.

• • •

(R. 2392) *Cross-Examination*

By Mr. Veeder:

Q. All I say is it not rather unusual at this time and this late in the twentieth century to find a large piece of land that was never surveyed? Isn't that right?

A. There at that time were various other tracts up and down the river with accretion ground that had not been surveyed.

Q. It was rather a good piece of business to get land, (R. 2393) using it, utilize it for at least a period of ten years where it wasn't taxed; is that right?

A. You say where it wasn't taxed? I was ready to pay taxes on this the minute they put it on the tax rolls. All they had to do—

• • •

(R. 2394) By Mr. Veeder:

Q. In other words you were aware of Joe Kirk and the source of his title, weren't you?

A. Yes, I knew. I had met Joe Kirk. Joe Kirk was out on the land with me.

Q. You knew that he didn't have any patents to his land; isn't that right?

A. I didn't really know what Joe Kirk had in the way of patents. I knew what was delivered to me.

• • •

(R. 2395) Q. And that was in, as I see it, dated April 27, 1959, it was filed for record on May 18, 1959. And contained in that agreement, I will read to you an excerpt which appears in the last pages of the arrangement.

It says, "If any action should be started against the parties hereto with reference to any lines—or I think it must be land—on either part of the farm, both parties will join in defense of such action. Or if any action had to be started, both parties will join in such action and each bear one-half of the expenses thereof, irrespective of where the line may be.

"It is further agreed that if in any action a substantial number of acres are lost to any party arising out of any claim or cause of action, the existing or arising out of any condition existing at the time of execution of this instrument, and adjustments accordingly will be made between the parties as to such lost acreage."

Now, isn't that statement that I just read to you a very clear caveat among the parties that they were not very sure of their titles; isn't that a reasonable assumption?

(R. 2396) A. This is true. This is the reason we brought the State of Iowa in because my attorney had

told me the State of Iowa should definitely be made a part of this.

We were aware that the State of Iowa might make a claim to it. Brought them into the action. They did claim a portion of the land. We negotiated a settlement.

Q. And there were not—and you received no notice, no statement, no inference that these lands were never officially surveyed in the State of Iowa by the General Land Office? Did you know that?

A. Well, I just stated a while ago I employed a professional engineer, Jack Virtue, licensed professional engineer to make the survey. This is the basis that it was quieted on in the Courts.

Q. And no one even suggested to you that the Indians or the national Government might have some claim?

A. No.

. . .

(R. 2397) ROSS WILLEY,

after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peters:

Q. Sir, will you tell the Judge, please, your name.

A. Ross Willey.

. . .

(R. 2414) GEORGE W. PRICHARD,

a witness called on behalf of the Defendants, being first duly sworn, was examined upon his oath and testified as follows:

Direct Examination

By Mr. Berkshire:

Q. Will you state your name, please?

A. George W. Prichard.

Q. Mr. Prichard, what is your residence?

A. Onawa, Iowa.

. . .

(R. 2423) Q. Entered right there?

A. Where I made the X there, that's where we came out of the bar.

Q. Thank you, Judge. Now you may sit down again. Would you describe to the Court where you went on horseback, if you remember?

A. Well, as I remember we started off to the right. That would have been west. And we followed up along the upper—not up to the bank, but we could see where the high bank was. And we wandered out there and got clear out to the river. I don't know just where. He directed, and we were talking and visiting, and now I don't know exactly where we went. But clear out to the river, and we come along the river bank a ways and turned down east and almost to what we call the English Bayou, and back up to where we started from.

Q. During that time would you describe the condition of the property?

A. Well, it was new bar land, and there was lots of willows. They were small, maybe the size of your fingers.

There would be spaces with sand dunes, nothing on it, and spots, quite large places, where there would be sweet clover which built up the land very well, and which he picked out for a good watermelon site, because sweet clover is very good for that.

. . .

(R. 2442) Q. This was in the '20's, wasn't it?

A. Oh, yes.

(R. 2443) Q. And, you were able to wade across the old water channel remnant there with hip waders?

A. We did.

. . .

(R. 2443) JOE KIRK, JR.,
the witness herein, being duly sworn, testifies as follows:

. . .

Direct Examination

By Mr. Berkshire:

Q. Would you state your name, please?

A. Joe Kirk, Jr.

. . .

(R. 2466) MERLE CUTLER,
a witness called on behalf of the Defendants, being first duly sworn, was examined and testified on his oath as follows:

. . .

(R. 2492) DR. GEORGE R. HALLBERG,

a witness called on behalf of the Defendants, being first duly sworn, was examined upon his oath and testified as follows:

Direct Examination

. . .

(R. 2610) Q. What causes the channel to come to that kind of a position between 1879 and 1890?

A. It's probably difficult to say exactly, but I suspect that one of the major changes was probably the—

Mr. Veeder: Are we back to suspecting again, Your Honor?

I think this is truly important.

If he has got an opinion, fine, but I can't see cross-examining on suspicion.

The Court: Are you objecting?

Mr. Veeder: Yes.

The Court: Sustained.

By Mr. Peters:

Q. What's your opinion as to things that occurred between '79 and 1890 that caused that channel—

Mr. Veeder: I think we have to have more foundation. I submit that there is no foundation from the period of '75 to '79 to 1890 at this point. There is not enough foundation.

Now, he is being asked an opinion, Your Honor, as to what are the differences between 1879 and 1890 and there

is not a scintilla of evidence that I know of for him to come up with an opinion in response to the (R. 2611) question that's been asked.

. . .

(R. 2617) Q. Between bar B and A—

A. Bar B and A or bar D and bar A. It is possible if we dropped this water level in 1879, this all might be—if we dropped down to a low water stage—this might be and the total emergent bar or land mass in this area, but then—in 1890 as we see this area has been overflowed, we probably had overbank deposits being formed in there which help go to increase or raise the elevation, the stabilization, and helped stabilize the bars that have formed back in this region.

Q. Does the land formed on the 1890 map east of the main channel of the river, which was shown as a water area between bars B and D and bar A in the 1879 river, has that been formed by accretion to the Iowa bank—

A. Yes, sir.

Q. —as the river moved to the west?

A. As the river moved to the west.

Q. And this has been deposition of sediments, silt and clays and sand, whatever might flow in during certain periods of high water?

A. Well, it's been filled in—

Q. Is that the kind of material that goes into that area?

(R. 2618) A. That would be the kind of material that went on top. This was, in essence, all bar deposits as the river migrated from the east high bank to its 1879 position.

Q. That would be sand—

A. Sand, and again, the typical bar deposits of the Missouri River in this part of the river as it adjoins Iowa would be the rather uniform, fine to medium sand, and there is bedding, stratification, and its whole texture. It's rather uniform with depth.

As the river migrated, it would be leaving accretion sand deposits. There would always be overbank deposits on it from subsequent events.

. . .

(R. 2620) Mr. Veeder:

. . .

(R. 2621) We have got a lot of confusion to begin with. So I would suggest that Your Honor, if Your Honor decides to do so, will put the sections on there. But I do think that this is going into the record. Section 32 is not there.

The Court: The Appellate Court, they have enough difficulty as it is with some decisions. This will be doubly hard without any numbers on them. They better be placed there if you are going to use them. Or I would suggest maybe you could use other exhibits if you have them on there.

. . .

(R. 2757) Q. Will you tell me which river it was and how—we are back where we were again. We are back to the point where you have to assume a river concerning which there's no evidence that came in here, obliterated this, rebuilt it, grew some willows, and wound up over here in 1879. Isn't that where we are?

A. The river between—when it hit, reached the high bank, the eastern high bank and when we see it in 1879 migrated and progressed to the south and east.

Q. But you have—

Mr. Peters: South and west.

The Court: South and west.

The Witness: South and west. I'm sorry.

By Mr. Veeder:

Q. But you have no evidence—

(R. 2758) A. We have no maps between those periods of time.

Q. That's right. So it is simply a matter of what do we call this? An educated guess as to what happened? Isn't that right? We have to say—

A. Any opinion about how the river moved between 1875 and 1879—

Q. Has to be—

A. —is indeed an educated guess no matter whose opinion or what his opinion is, sir.

Mr. Veeder: Your Honor, I move to strike this witness' testimony. He says he has an educated guess in here. And we can't tolerate educated guesses.

The Court: Motion denied. We are arguing semantics.

Mr. Veeder: I just wanted to be sure it was in the record it was an educated guess, Your Honor.

* * *

(R. 2854) PHILIP BURKE

Philip Burke, a witness called on behalf of the Defendants, being first duly sworn, was examined and testified on his oath as follows:

* * *

(R. 2863) MRS. A. W. ENGLISH,

after having been first duly sworn, was examined and testified as follows:

* * *

(R. 2884) ALAN G. LOFTIS,

a witness called on behalf of the Defendant Travelers Insurance Company, being first duly sworn, was examined upon his oath and testified as follows:

* * *

(R. 2894) JOHN F. KENNEDY,

the witness herein, duly sworn, testifies as follows:

* * *

(R. 2910) Q. Have you visited the Blackbird Bend reach of the Missouri River, which is the subject of the litigation?

A. Yes, I have.

Q. And can you just describe briefly the nature of your visitation? What you did, what you were looking for and what you saw?

The Court: When you got there, when you made the (R. 2911) visit.

The Witness: Okay. The visit was made in early July of this year, during the first two weeks of July.

Mr. Veeder: Did you say the visit?

The Witness: Was made.

Mr. Veeder: The visit?

The Witness: Yes, sir.

Mr. Veeder: Thank you.

. . .

(R. 2912) Q. Now, in your judgment and on the basis of your experience, is there anything particularly unusual or atypical about the Blackbird Bend reach of the river?

A. No. I—

Mr. Veeder: I would object to this question, Your Honor. The man says he made a visit and flew over. And I respectfully submit, he wouldn't have background, knowledge or understanding adequate to respond to that question. And there appears to be no foundation whatever upon which he can make response.

The Court: Overruled. Overruled. Go right ahead.

. . .

(R. 2940) Mr. Veeder: Now, Dr. Kennedy, you say you were on the ground one day?

The Witness: Yes, sir.

. . .

The Witness: I have been on the ground once. I have been over it more than once in an airplane.

. . .

(R. 2942) What happened to extend this lobe so far to the east clearly was this bend was attacking the outer side of the bank. The fact that there is a high bank here suggests that was roughly the limits of the meander belt which had been formed by the over geologic time periods by the lateral migration of the river and its going back and forth across the valley, and the river had progressed to this high bank.

At this stage it's in a condition of extreme meandering, but it got there by scour of the outside and deposition and lower flows, as well as higher flows on the innerbank.

Now, it had reached this, what Friedkin refers to as its limiting width of the meander in this state.

Now, between 1875 and '79, I believe one of two—or probably both things happened. Let me put the most important one first.

. . .

(R. 2944) Q. Look at Tribe's Exhibit 99 then and tell me what has caused the formation of the bar in Sections 33 and 28, which we have labelled bar A on Exhibit N-3?

Mr. Veeder: I object, Your Honor. There is absolutely no foundation whatever for this opinion as to what made that bar.

The Court: Overruled.

* * *

(R. 2947) Q. The question essentially is what's your opinion as to how bar A, as is shown on Exhibit N-3, during the recess we put up U because it has the thalweg soundings on it. How was that formed during the period between 1875 and 1879?

Mr. Veeder: I have an objection to this and it was overruled, Your Honor. Isn't that the record?

The Court: Right.

The Witness: All right. I have testified that it is my judgment that this whole convex bar had been obliterated during this period of the high flows that occurred in the four years between '75 and '79.

Now, as the channel progressively moved to the west and with the thalweg shifting westward, this would become a river of diminished velocity, a slack (R. 2948) water area or area of lowest velocity. Consequently, sediment that gets into this area would tend to be deposited because of the diminished sediment transport capacity of the water flowing in this area.

Additionally, when this was all inundated there would be moving through it here and ensemble of very large sand waves or sand dunes.

By Mr. Peters:

Q. Were these moving along the bottom?

A. These were moving along the bottom, yes. These can have characteristic lengths in the Missouri River of up to several hundred yards, and characteristic heights of crests of ten to twenty feet. These were brought in. It appears some of these were left behind, which I suspect formed these features.

So this whole area becomes a sheltered area with water getting into it, having diminished sediment transport capacity. So it starts to silt in. But I think this bar was formed principally probably when the principal part of the channel was moving to the west and the flow coming around here tended to form a point bar. One can even see a remnant of a small one at this point, which is just below the number 29, extending into the channel.

* * *

(R. 2950) By Mr. Peters:

Q. Where that chute is?

A. Where that chute is. And that is a—consequently, a relatively deep area. Now, as the flow comes around what at one time between '75 and '79 was this convex bar to the north and east, there forms a point bar that submerged, protrudes out into the channel. I believe this likely was formed during a period of very high flow. And sediment would be deposited in the wake or downstream from that until this progressed on around.

Meanwhile, these other bars became deposited, I believe, during some recession.

Q. Bars B and D?

A. B and D. And during subsequent rises and revisions and even during ordinary flows, water brought sediment in here that was deposited, and deposited over in this area. Then when we got to a somewhat lower flow when this was made in '79, lower than those we have reported for the years between '75 and '79, we see this protruding.

Q. Is this an accretion bar?

A. It's an accretion to this area up here in that when the flow receded this would be attached to the Iowa high bank.

(R. 2951) Q. Easterly high bank?

A. Easterly high bank, yes, sir.

* * *

(R. 2952) Q. Is that ground likewise accretion to the Iowa high bank, or accretions to the accretions to the Iowa high bank?

Mr. Veeder: Object to that. There's absolutely no foundation to this, Your Honor. Accretions to what and where, and he is looking at a river full of water.

The Court: Overruled.

* * *

(R. 2953) By Mr. Peters:

Q. Now, on the 1875 river we have the Barrett Survey line superimposed. Are there in your opinion—there's an area outside to the east of the Barrett Survey line labeled on Exhibit 96 "low sandy point subject to frequent inundation." Is that accretion to the Barrett Survey land

as surveyed by Barrett in 1867 as the river moved to its 1875 position?

Mr. Veeder: Renew my objection. There's no foundation.

The Court: Overruled.

The Witness: (Answer) Yes, that is accretion. And it was left behind as the river moved progressively eastward by the mechanism I described earlier this morning. Now, we are seeing this material, of course, was probably deposited or had to be deposited at a high flow.

* * *

(R. 2955) By Mr. Peters:

Q. What I am trying to find out, Dr. Kennedy, is whether you have an opinion as to whether any of the land that we see lying either north or east of the '79 thalweg, whether any of it is land that you can identify as being land that would be within the Barrett Survey or any accretion to it as shown on the '375 map?

A. Yes, I have an opinion.

Q. And what is your opinion in that regard?

Mr. Veeder: I object to this, Your Honor. (R. 2956) Absolutely no foundation in this man testifying in regard to the location of any land within the Barrett Survey or anyplace else.

The Court: Overruled. You have an opportunity to cross-examine. Go ahead.

The Witness: As I have tried to point out several times, I am confident that this Barrett bar was completely re-worked during the period of 1875 to 1879.

By Mr. Peters:

Q. Eroded away?

A. Eroded away, and consequently much of the material that we see in 1875 as Barrett bar has been taken away and is now on its way to the Gulf of Mexico.

* * *

(R. 2967) Q. Now, using Tribe's Exhibit 105, and using as a point of reference the 1867 Barrett survey line, the north limb of it that comes down through Section 24 and, then, travels to the east, do you have an opinion, Dr. Kennedy, as to whether the land lying to the east and to the north of that line is by 1923 all accretion land accreted to the northerly Iowa high bank?

A. Well, it is clearly attached to the northerly high bank that we see in this map, and we don't see any intervening water. And, I believe there is little doubt that as the river moved subsequent to 1906, or even 1890, it did so in the manner I just described by eroding away on the outside of this curve which in 1923 is shown in Section (R. 2968) 15 of Township 24 north, Range—I can't see it on this map. In the Nebraska designation, Township 24 north, Range—well, I'll identify it another way.

Q. The range lines are these lines here.

A. Range 10 east. This is an area, clearly, of erosion. This is deposition. So, this has moved southward, perhaps, for surely, sometimes faster than other times, but, progressively reworking the surface of the land as it progressed southward.

Q. Now, the mapping on 1923 by the Corps in the area that we've just discussed is only that mapping which

is shown on Exhibit 105. So, the bare or white area is of an unknown quantity to us in 1923. But, the Corps in their 1927 map does map that area. And, I put up for comparison purposes, the Tribe's Exhibit 106 which shows the nature of the land forms that lie to the east and to the north of the north limb of the 1967 Barrett survey to give you some idea of the geologic features that may be there. Does that alter in any way your opinion as to whether or not the land north and east of the Barrett survey is accreted to the Iowa high bank?

A. No, we still—there are several remnant channels as you can see as this progression—process of consolidation has occurred. Clearly, all of the channels have this general convex to the southwest behavior, and I would (R. 2969) expect them to be working their way by scour on the southwestern side, deposition on the northeast side towards the southwest.

* * *

(R. 2972) Q. I'll be glad to rephrase the essence of the question. You stated, as I heard you say, this map was reflective of the southern progression of the river to its position as depicted on 105.

A. I testified that the river got to its position shown in Exhibit 105 in 1923 from the position which one can conclude, logically, that it had in 1912 by a process of erosion on the southern side after passing around this bend to the left.

(R. 2973) Q. So, you are not saying that this map here, 105, is reflective of that progression?

A. This map does not show any progression. It shows the way things were at that time.

Q. Did you know that this is the end of the mapping, that this is the only mapping that was done by the Corps of Engineers in 1923?

A. I knew that this area had not been mapped. The area to the north and east of the river channel and the Barrett survey line.

. . .

The Witness: I testified or I stated that this line which we call the Omaha Indian Reservation on Exhibit 106, which is, roughly, the easterly high bank, that position likely was—could have been achieved by the river (R. 2974) in its eastward migration.

Q. Didn't you say, though, and I'm going back, again—Did you say that this channel, this water that is shown in Section 29 of Township 84, Range 46 west and that continues on westerly was the remnant of the main channel of the 1906 river? Now, did you or did you not say that? That's a yes or no question.

A. I did not say it in those words.

Q. Or did you or did you not state in substance, then, that this river that I'm pointing to—

The Court: In Exhibit—

The Witness: 106.

Mr. Veeder: —on 106, that's the 1927 Missouri River, is the remnant of the 1906 river as depicted on Wilson D-4, isn't that what you said?

A. It is reasonable to assume that that is what it is, because the river has—this has very nearly the same position as this bend of the river shown in the 1906 map.

Q. Did you or did you not say it?

A. I'm saying it now.

Q. You are saying it now. So, we have a situation where the river—this river—this 1906 river that we're looking at here on Exhibit 106, progressed northward to the 1920-1912 location on L-4, is that what you are telling us?

A. Well, I pointed out that in the 1912 map one has to make (R. 2975) certain assumptions as to where the river was. At the stage at which it was mapped it is reasonable to assume that it flowed around this sandbar across 19 and 20 and was directed towards or headed towards this high bank that comes through Sections 20 and 19.

. . .

(R. 2979) Q. All right. What are you talking about then?

A. I am saying a part of this I believe to be a remnant of the 1906 channel. Now, I have stated repeatedly that from time to time this whole area is inundated. Bars form, new subchannels form during the period of reworking in these high flows of very active sediment transport. And I think its entirely possible that, for example, this is a remnant of another event at some other time—I don't know when—which came together with this.

. . .

(R. 2993) By Mr. Veeder:

Q. Now, is it not true when there was accretion from the northerly high bank, as you say, that it would neces-

sarily obliterate and take out the 1906 remnant when it came back down south as you said that it did, isn't that essential?

A. The accretion does not occur as a uniform deposition over all areas. You can have, as I testified, some remnant channels progressively becoming silted in, but which still transport some sediment.

The areas over which the deposition occurs preferentially are those in higher elevation and shallower depth, lower sediment transport.

. . .

(R. 3000) By Mr. Veeder:

Q. Now, the next map that we allude to in this sequence as offered by the Tribe, have you studied the field notes on that, the Barrett field notes?

A. I can't say that I have studied them. I have seen them, but not—

Q. But you have not studied them in detail?

A. I have not.

Q. Were you aware, then, that there were two phenomenon outlined by Barrett which might presage what happened (R. 3001) to the meander lobe? One, he describes a high water channel. Were you aware of that?

A. I was aware that this channel has been shown on the map.

Q. And that intersects the lobe west of the common range between Ranges 10 and 11 in Township 24?

A. And he did specify that that was a high water channel.

Q. Yes. And he also specified that, if you recall, that it did presage a possible cutoff; is that right?

A. I have heard it or read it in other testimony.

Q. But you're not arguing on that?

A. (No response.)

Q. Now, there was another phenomenon you alluded to, the relinquishment of allotments by the Indians. Were you acquainted with the area which lies in Sections 14 and 15 of Township 24, Range 10 East, that there was a low area as depicted by Barrett? Were you acquainted with that situation?

A. No, I don't recall having—

Q. You're not?

A. (Witness shaking head in a negative manner.)

. . .

(R. 3031) Q. You do not know and you cannot find from looking at that map the Iowa lands to which the sandbar to which you alluded and which has willows on it accreted to the Iowa bank; is that right? You don't know where it accreted to, do you?

A. Well, accreted to do not refer to that as a particular point. There's an area in which they merge together. And—

Q. Go ahead.

A. I cannot say specifically that they were merged together here or at this point or at some other point.

All I can say is I would expect as rivers normally behave for this to be an area of deposition, and deposition would occur preferentially along the Iowa bank.

* * *

(R. 3032) Q. All right. We are looking, then, at this island that's one area that's surrounded by water that has willows on it, right?

A. Yes, that's what the map shows.

Q. So once again we have a period up where the land you say had been obliterated, completely restored, and willows grow?

A. I didn't say completely restored.

(R. 3033) Q. You said restored. Certainly it was restored to some degree to have willows.

A. That soil was redeposited.

Q. And you don't know just when?

A. Sometime between '75 and '79 according to these maps.

Q. But you don't know when it occurred?

A. Not with more accuracy—

* * *

(R. 3067) HAROLD M. SORENSON,

a witness called in his own behalf, having been previously duly sworn, was examined upon his oath and testified as follows:

* * *

(R. 822) CHARLES S. ROBINSON

A. Tribe Exhibit 91 is a sample of a channel fill, or clay plug. It is the material that forms in an abandoned channel, and it consists principally of clay with a little silt and sand and, characteristic of it, is organic material.

* * *

(R. 1615) RAUL McQUIVEY

. . . have two samples right against the high bank which are basically silt clay, indicating the remnants of an old channel. Those are samples 46 and 45.

* * *

(R. 2824) GEORGE HALLBERG

By Mr. Veeder:

Q. Mr. Witness, would you take Exhibit 29 down. Now, right beside you right on the bench. I understand your opinion when the river by erosion moves from the easterly bank westward, it leaves behind it channels with river channel deposits in them and that the accretions do not have a homogeneity—no, a continuity in regard to the kind and type of soils that are left; is that correct?

A. Do you mean river—when you say river channel deposits do you mean channel fill deposits—

Q. Yes.

A. —as have been discussed? Where you have old channels which have formed, you have got channel fill deposits, because they form subsequent to the channel having been left there. As these have been discussed, these fine-textured silts and clays which are left behind in these channels are materials which fill in this channel subsequent to its having been left on the flood plain.

* * *

(R. 820) CHARLES S. ROBINSON

A. Exhibit 89 is a sample taken from a Blackbird Bend area, of the material in a point bar deposit. It consists of a medium to fine sand, with minor amount of clay.

. . .

(R. 2587) GEORGE HALLBERG

A. Well, the general nature of bar deposits up and down the entire Missouri River Valley, as it joins Iowa, at any rate, are essentially fine to medium sand. Now, as these have been described by both Dr. Robinson and Dr. McQuivey, the bar deposits are rather uniform in terms of being within this grade size of sand, rather—well, rather uniform, fine to medium sand that goes to considerable depths.

. . .

(R. 821) CHARLES S. ROBINSON

A. The upper part of it, the upper two inches in this plastic tube, is overbank deposit, and it consists of fine silt and clay. And this is the material that is deposited by a stream over the area at the time of inundation and/or flooding.

. . .

IOWA EXHIBIT M-8

(R. 1954, 1958)

Charles E. Lakin et ux
Quit Claim Deed and Easement
State of Iowa

Filed for record this 28th day of May
A. D. 1965 at 11:55 o'clock A. M.

No. 1806 Paul McFarland, Recorder
Fee \$2.50

QUIT CLAIM DEED AND EASEMENT

KNOW ALL MEN BY THESE PRESENTS:

That CHARLES E. LAKIN AND FLORENCE LAKIN, HUSBAND AND WIFE, of Mills County, State of Iowa, in consideration of the sum of One Dollar and other valuable consideration, including settlement of disputed claims between the parties, do hereby quit claim unto THE STATE OF IOWA all our right, title, interest, estate, claim and demand in or to the following described real estate situated in Monona County, Iowa, to-wit:

All those parts of the following described Sections: Section 31, Township 84 North, Range 46 West of the 5th P.M.; Section 6, Township 83 North, Range 46 West of the 5th P.M.; Section 1, Township 83 North, Range 47 West of the 5th P.M.; and Sections 25 and 36, Township 84 North, Range 47 West of the 5th P.M., lying to the South and West of the following described line:

Commencing at a point on the Iowa-Nebraska Compromise Boundary Line of 1943 which is 117.43 feet North and 1365.40 feet East of the projected Southwest corner of Section 31, Township 84 North, Range 46 West of the 5th P.M.; thence North 39° 28' 30" West a distance of 612.0 feet, thence North 45° 11' 00" West a distance of 424.94 feet, thence North 66° 57' 30" West a distance of 332.51 feet, thence South 81° 40' 00" West a distance of 141.16 feet, thence South 62° 23' 30" West a distance of 151.12 feet, thence South 49° 37' 30" West a distance of 257.35 feet, thence South 49° 37' 30" West a distance of 257.35 feet, thence South 78° 31' 30" West a distance of 166.49 feet, thence North 82° 31' 00" West a dis-

tance of 572.90 feet, thence North 67° 29' 30" West a distance of 256.94 feet, thence North 57° 44' 30" West a distance of 466.86 feet, thence North 41° 54' 30" West a distance of 513.62 feet, thence North 9° 46' 30" West a distance of 754.32 feet, thence North 10° 38' 30" West a distance of 546.48 feet, thence North 24° 19' 30" West a distance of 271.25 feet, thence North 41° 30' 30" West a distance of 222.23 feet, thence North 67° 20' 00" West a distance of 415.31 feet, thence North 61° 37' 30" West a distance of 274.63 feet, thence North 71° 58' 30" West a distance of 351.45 feet, thence North 52° 33' 00" West a distance of 406.25 feet, thence North 50° 41' 30" East a distance of 21.16 feet, thence North 60° 42' 30" East a distance of 135.69 feet, thence North 46° 10' 30" East a distance of 122.15 feet, thence North 16° 45' 30" East a distance of 207.93 feet, thence North 4° 38' 30" West a distance of 155.96 feet, thence North 17° 02' 30" West a distance of 377.48 feet, thence North 20° 49' 00" West a distance of 159.95 feet, thence North 01° 12' 00" East a distance of 144.98 feet, thence North 09° 02' 30" West a distance of 177.97 feet, thence North 14° 24' 30" West a distance of 194.62 feet, thence North 04° 56' 30" East a distance of 182.30 feet, thence North 08° 51' 30" East a distance of 122.95 feet, thence North 02° 26' 30" West a distance of 234.50 feet, thence North 03° 57' 30" West a distance of 153.15 feet, thence North 02° 02' 30" East a distance of 146.55 feet, thence North 09° 06' 30" East a distance of 255.69 feet, thence North 08° 20' 00" East a distance of 14.61 feet, to a point which is one quarter mile North of the line or projected line between Sections 25 and 36, Township 84 North, Range 47 West of the 5th P.M., and 3543.5 feet due West of the Northeast corner of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 25, Township 84 North, Range 47 West of the 5th P.M.

WHEREAS the grantee of this instrument has constructed a lawful partition fence on or near the line here-

inabove described, grantors do hereby grant to grantee, its officers, agents and employees, an easement for maintenance of said fence to the ground upon which said fence is built and to a strip of ground 10 feet in width adjacent thereto to the North and East therefrom. This easement for maintenance of said fence shall be permanent and perpetual, excepting only that if grantee shall fail to maintain said fence as a lawful partition fence, then and in that event, this easement shall automatically cease and terminate.

The grantors herein reserve to themselves, their successors and assigns an easement and right of access from their lands lying on the Easterly side of the line hereinabove described, and North of the point where said line intersects U.S. Army Corps of Engineers Dike No. 749.3, to the normal high water mark of the water which is located or lying West of said boundary line, but this reservation shall not be construed as authorizing or empowering grantors or their successors or assigns to utilize the ground subject to said easement for any agricultural or commercial purposes.

Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the above described premises.

Executed this 24th day of May, 1965.

/s/ Charles E. Lakin

/s/ Florence Lakin

State of Iowa, Mills County, ss.

On the 26 day of May, 1965, before the undersigned Notary Public in and for said County and State person-

ally appeared Charles E. Lakin and Florence Lakin, husband and wife, to me personally known to be the identical persons named in and who executed the foregoing instrument and acknowledged that they executed the same as their voluntary act and deed.

/s/ Donald L. Twaddle, Notary Public
in and for said County and State.

(Notarial Seal - Iowa)

IOWA EXHIBIT N-8

(R. 1954, 1958)

Raymond G. Peterson et ux
Quit Claim Deed
State of Iowa

Filed for record this 25 day of May
A.D. 1965 at 9:30 o'clock A.M.

No. 1739 Paul McFarland, Recorder
Fee \$2.50 Maxine Jensen, Deputy

QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

That RAYMOND G. PETERSON AND MARJORIE N. PETERSON, husband and wife, of Council Bluffs, Pottawattamie County, Iowa, in consideration of the sum of One Dollar and other valuable consideration in hand paid, including mutual agreements between the parties which are not set out in detail herein, but which are made a part hereof by this reference, do hereby sell,

convey and quit claim unto the State of Iowa all our right, title, interest, estate, claim and demand in or to the following described real estate situated in Monona County, Iowa, to-wit:

Commencing at a point 3543.5 feet west of the northeast corner of the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Twenty-five (25), Township Eighty-four (84) North, Range Forty-seven (47) West of the 5th P.M., thence North 08° 20' 00" East 242.73 feet, thence North 10° 26' 00" East 225.77 feet, thence North 21° 38' 00" East 137.83 feet, thence North 35° 58' 20" East 130.69 feet, thence North 23° 37' 20" East 104.80 feet, thence North 36° 32' 20" East 257.73 feet, thence North 19° 56' 00" East 298.73 feet, thence North 10° 12' 00" East 85.35 feet; thence North 20° 59' 40", East 125.24 feet, thence North 14° 06' 40" East 294.83 feet thence North 14° 16' 40" East 242.40 feet; thence North 05° 55' 40" East 248.81 feet, thence North 14° 35' 00" East 163.76 feet, thence North 01° 20' 00" East 142.12 feet, thence North 06° 30' 00" East 173.51 feet, thence North 02° 48' 00" East 257.10 feet, thence North 07° 01' 40" West 112.46 feet, thence North 13° 40' 40" West 52.72 feet, thence North 05° 12' 40" East 179.76 feet, thence North 01° 43' 20" West 174.60 feet, thence North 15° 16' 40" East 191.41 feet, thence North 02° 18' 00" East 330.05 feet, thence North 04° 58' 00" West 192.40 feet, thence North 01° 47' 20" West 288.02 feet, thence North 04° 47' 20" West 87.80 feet, thence North 08° 13' 20" West 342.64 feet, thence North 03° 07' 20" West 138.37 feet, thence North 13° 31' 00" West 261.14 feet, thence North 09° 45' 00" West 238.27 feet, thence North 03° 18' 40" West 286.32 feet, thence North 06° 05' 20" West 195.35 feet, thence North 01° 57' 20" East 182.41 feet, thence North 02° 01' 40" West 184.25 feet, thence North 30° 13' 20" West 11.89 feet, thence North 02° 11' 40" West 162.78 feet, thence North 22° 04' 20" West 84.42

feet, thence North 33° 36' 20" West 298.35 feet, thence North 45° 06' 00" West 214.78 feet, thence North 06° 46' 00" East 465.0 feet, thence North 01° 32' 00" East 500.0 feet, thence North 01° 03' 00" West 500.0 feet, thence North 13° 29' 00" West 500.0 feet, thence North 16° 34' 00" West 170.90 feet to a point which is South 89° 47' 30" West 847.40 feet from the North Quarter Corner of Section Twenty-four (24) Township Eighty-four (84) North, Range Forty-seven (47) West of the 5th P.M., said point being on the North Section line of said Section 24, thence West or Westerly along the North line of said Section 24 to the point where said section line intersects with the Iowa-Nebraska State boundary line as fixed by 1943 Compact between said states, thence Southerly along said Iowa-Nebraska State boundary line to the point where said boundary line intersects the South Quarter Quarter line of the aforementioned Section 25 extended West to intersect said state boundary line, thence East to point of beginning. The above described real estate being situated in Sections 24 and 25 and possibly partially in Section 26, all in Township 84 North, Range 47 West of the 5th P.M.

Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the above described premises.

Executed this 4 day of May, 1965.

/s/ Raymond G. Peterson

/s/ Marjorie N. Peterson

State of Iowa, County of Pottawattamie, ss.

On this 4 day of May, 1965, before the undersigned Notary Public in and for said County and State, personally appeared Raymond G. Peterson and Marjorie N.

Peterson, husband and wife to me known to be the identical persons named in and who executed the foregoing Instrument and acknowledged that they executed the same as their voluntary act and deed.

/s/ Dorthy Ann Snethen

Notary Public in and for said
County and State.

(Notarial Seal - Iowa)

TRIBE'S EXHIBIT NO. 7

(R. 11, 13)

DOCUMENTS RESPECTING THE SELECTION
BY THE OMAHA INDIAN TRIBE OF THEIR
RESERVATION, PURSUANT TO THE
TREATY OF 1854

General Land Office
March 19th, 1856

John Calhoun, Esq.
Surveyor General
Wyandotte, Kansas

Sir

Enclosed herewith I transmit to you the following papers. A copy of field notes of the Omaha Reservation surveyed by W. Barnum under the instructions of the Indian Bureau together with a plat of the same & a copy of a communication from the Commissioner of Indian Affairs dated 13th instant in reply to my letter of the 10th of the same month which [illegible word] the inquiries as follows; viz.;

Whether location of the Omaha Reservation at Blackbird Hills was to be treated as the permanent

location, and if so whether in virtue of the exchange of the location, the Indian title is extinguished to the tract of land stipulated in the first article of the Treaty and described as lying north "of a line drawn due west from a point in the centre of the main channel * * * to the western boundary of the Omaha country". Those inquiries having been answered by the Commissioner of Indian Affairs in the affirmative, the foregoing named papers are sent to you for your information and action in conformity with the instructions from this office in similar cases. Respectfully, I am

Thomas A. Hendricks
Commissioner

Department of the Interior
Office of Indian Affairs
March 13th, 1856

Sir:

I have to acknowledge the receipt of your letter of the 10th instant relative to the reservation for the Omaha Indians at Black Bird Hills Nebraska Territory.

In reply, I have to answer your inquiries affirmatively, and to state, that it was announced in the last annual Report of this Office, (which may be found in the "Daily Union" of January 19th, 1856) that "the country above the Ayoway, not being satisfactory to the Omaha Indians, and in the judgment of the Department, not suitable for them, they were assigned a reservation for a *permanent home* at the Black Bird Hills in Nebraska Territory, *to which they removed in the month of May last.*"

Very Respectfully,
Your Obedient Servant
George W. Manypenny
Commissioner

To Thomas A. Hendricks
Commissioner of the
General Land Office

General Land Office
March 10th 1856

Hon: George W. Manypenny
Commissioner of Indian Affairs

Sir,

Referring to your letter of the 28th November last transmitting for the information of this office copies of documents therein specified, embracing a map exhibiting the outline of a Reservation for the Omaha Indians at Blackbird Hills as surveyed by Mr. Barnam, I beg leave to inquire:

(1) Whether said location is to be treated and held as the permanent location made under the authority of the proviso in the first article of the Treaty of 16th March 1854 in lieu of the tract situated north of "a line drawn due west from a point in the center of the main channel" of the "Missouri River due east of where the Ayoway river disembogues out of the bluffs, to the western boundary of the Omaha country" and

(2) Whether in virtue of the exchange, the Indian title may be regarded as extinguished to the second tract above mentioned.

This information is wanted to enable us to advise the Surveyor General understandingly in instructions we propose to dispatch to him in the matter. I have the honor to be

Very respectfully
Your Obt. Servt.

Thomas A. Hendricks
Commissioner

Department of the Interior
Office of Indian Affairs
November 28th 1855

Sir:

For your information, I transmit herewith copies of the letter of the 1st September last to this Office from Agent George Hepner and its enclosures, the field notes and map of the Survey of the Omaha Reservation at Blackbird Hills by W. Barnum, surveyor.

Very respectfully
Your Obt. Servant

George Manypenny
Commissioner

Hon: Thomas A. Hendricks
Commissioner of the
General Land Office

Council Bluffs Agency
September 1st 1855

Sir:

I send you field notes and map of the Survey of the Omaha Resrevation at B. B. Hills by Mr. Barnum Surveyor, should he not have made proper return, or notes full he is bound to make the necessary correction.

Respectfully your
Your Obt. Servant

Indian Agent
George Hepner

Col: A. Cumming
Supt. Indian Affairs
St. Louis
Missouri

16.

"Field notes of the boundary of the Omaha Indians Reservation." (Original and Copy)

Completed June 27, 1855

W. Barnum, Surveyor
(Council Bluffs—C-1602-1855)

From "Ancient and Miscellaneous Surveys," vol. 3, pp. 473-480

Field notes of the Boundary of the Omaha Indian reservation.

The Southeast corner is known as the mouth of Woods Creek or the point where said creek empties in the Missouri River, thence running due west six miles two hundred ninety eight rods to the south branch of Blackbird creek, said creek is fifteen feet wide and has a cotton wood sight tree on the east bank of sixteen inches in diameter, thence west six miles one hundred sixty rods to Middle creek, said creek is twenty five feet wide and runs to the south thence west sixteen miles two hundred and two rods to the southwest corner of the reservation and known as a mound two and one half feet in diameter and two feet high with the sod taken from the southside and said mound is further described as being sixteen rods south and sixty rods west of a small branch creek, thence north fifteen miles two hundred sixty rods to Middle creek, said creek is twenty four feet wide and runs to southwest, thence north two miles sixty rods to northwest corner and said corner is known as a mound three feet in diameter and two feet six inches high sod taken from the west thence east seventeen miles two hundred fifty two rods to south

branch of Omaha Creek, said creek is fifteen feet across, thence east three miles two hundred eighty five rods to the Missouri River, thence down said river to place of beginning and containing three hundred thousand acres of land, and said boundary line is further described by having mounds erected on the high ground from eighty rods to one mile apart and so situated as to be visible from one to the other and sod taken from the outside of said line as completed by me the 27th day of June A. D. 1855.

W. Barnum
Surveyor

Department of the Interior
Office of Indian Affairs
May 14th 1855

Cumming, Esq. A.,
Supt., Indian Affairs
St. Louis, Mo.

Sir:

Your letter of the 3rd instant has been received together with the enclosure from Agent Hepner in which he states that he had, on the 16th of April, had a council with the Omaha Indians at which they not only refused to make a selection elsewhere than in the "Black Bird Hills" and refused to go even there until an annuity payment was made to them in money.

On the 9th instant I reported the substance of the Agents communication to the Secretary of the Interior with the remark that though the power to select a country for these people was vested by the Treaty in the President, it appears only their assent was required, not that they had some right to make a choice [several lines illegible] yet to accommodate and placate them he had exercised his authority and acceded to a selection made by themselves although

there were many and strong reasons against it and that still they wished to prescribe conditions before removal. Also that it appeared to me that there was an imperious necessity for confirming the selection made and that the Country indicated therein be proclaimed at the earliest practicable date as their reservation, in consequence of the emigration that is pending in that direction, and I advised that Agent Hepner should be directed to give publicity to the fact of its being so reserved, and as near as might be of the extent of the same which must not however exceed 300,000 acres.

The Secretary has agreed to my recommendation. You are therefore required to instruct Agent Hepner to proceed at once to define the location taking the point known as the "Hills as a nucleus, and when defined require notice in the manner best calculated to render it as public and effective as possible. What are its limits, that such constitute an Indian reservation and that no white person will be permitted to settle within the same.

In laying [illegible line] in mind particularly that it should front upon the river to as limited an extent as is consistent with utility, and in describing the boundary he should proclaim that they extend from a given point upon the river to another point thereupon and then so far as westward or back as will make the number of acres deemed in his judgment sufficient, and compatible with the known wishes of the Indians, which however cannot under Treaty stipulations exceed 300,000 acres, and which should in fact be as much less that amount as will practically suffice.

He should inform the Indians that the money for their removal and subsistence which is considered ample for their present wants, is now in St. Louis subject to his order, and subject to be paid over to him whenever he is satisfied of their disposition to remove. That under no circumstances will an annuity

payment be made until their removal actually takes place, and that he should warn them against listening to the advice of evil disposed and designing white men in this respect, and to assure them that as soon as they do remove the Department will listen to their wishes, and to gratify the same so far as it can legally and consistently with their true interests, do so.

In view of the combination of circumstances which have retarded their removal to this late period, and if they have planted a crop and can peaceably get along with the whites it may not be impolitic to let them remain until the fall of the year, but he should proceed at once as directed in regard to defining their reservation and to arrange for breaking up lands within the same for cultivation; but in the meantime he must impress upon the Indians, that if they do listen to these designing and interested white men and not remove quietly and in peace, the Government will be compelled to force them to do so.

You will also instruct Mr. Hepner that the Department considers it as really necessary that he should reside among the Indians, and expects that he will immediately make his arrangements to do so, likewise when the location is defined, if no accommodations are upon it suitable for a residence, with the understanding that he is to live among them he will submit an estimate for requisite buildings.

Very respectfully
Your Obt. Servant

George W. Manypenny
Commissioner

Department of the Interior
Office of Indian Affairs
May 9th 1855.

McClelland Hon. R.
Secretary of the Interior

Sir

Referring to former communications upon the subject of a permanent location for the Omaha Indians, I have the honor herewith to transmit a copy of a letter from Superintendent Cumming, and of one from Agent Hepner, enclosed by the Superintendent from which you will perceive that the Agent had received my instructions of the 21st March last, which had been approved by you, and says that in compliance with those instructions he had held a council with the Omahas, that they not only refused to make a selection elsewhere than at the Black-Bird Hills, but refused to go even there unless the Government should make them an annuity payment in money and furnished them with protection, etc.

The Treaty provides that they shall have a certain reservation, but if, upon exploration, it be found unsuitable, the President may with the consent of said Indians set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. In the instructions the agent was told that in addition to the dissatisfaction of the Omahas with their reserve, a military post could not now be established above the Ayoway, consequently it might be considered impolite to remove them thither, but that there were some objections to the selection of a reservation at the Black-Bird Hills—those reasons were very cogent, provided another suitable in soil, timber and water could be obtained. It was suggested that one could possibly be gotten near the Ottoes and Missouriias, and the privilege was given them of selecting in any section of the Country unappropriated North, South or West of the Ottoes and Missouriias, and finally of taking the Black-Bird Hills, if they could not otherwise be satisfied. The President by the Treaty was the person to whom the authority was given to select, but even the authority was waived to accommodate and to please them, and the selection was accordingly made by them of the "Hills,"—which as stated there were objections to their possessing—yet the President had ac-

ceded thereto. They wish now to prescribe the conditions upon which they will consent to remove, and the question is submitted for your consideration and advice as to what action shall be taken.

And I would remark that it does seem to me that there is an imperious necessity for confirming the selection made, and that the country indicated should be proclaimed at the earliest practicable date as their reservation—the emigration that is tending in that direction is so great that in a short time this country will inevitably be to a considerable extent settled by the whites, and serious conflicts must be the result. I would, therefore, recommend that this selection be confirmed, and taken and considered as their future home, and that Agent Hepner be directed to give publicity to the fact of its being so reserved, and as near as may be of the extent of the same; —which is not to exceed 300,000 acres.

Very respectfully
Your Obt. Servant

George W. Manypenny
Commissioner

Hon. R. McClelland
Secretary of the Interior

SEP 14 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE
LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAR-
OLD M. AND LUEA SORENSON,

Petitioners,

No. 78-161

R.G.P. INCORPORATED, OTIS PETERSON, AND
TRAVELERS INSURANCE COMPANY,

Petitioners,

No. 78-162

STATE OF IOWA AND STATE CONSERVATION COMMISSION
OF THE STATE OF IOWA,

Petitioners,

GORDON DAHL AND 81 OTHER FARM OWNERS IN
MONONA COUNTY AS AMICI CURIAE

THE AMERICAN LAND TITLE ASSOCIATION AS
AMICUS CURIAE

v.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF FOR THE OMAHA INDIAN TRIBE
IN OPPOSITION**

WILLIAM H. VEEDER

Attorney

Omaha Indian Tribe

Suite 920

818 18th Street, N.W.

Washington, D.C. 20006

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE
LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAR-
OLD M. AND LUEA SORENSON,

Petitioners,
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STATE OF IOWA AND STATE CONSERVATION COMMISSION
OF THE STATE OF IOWA,

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GORDON DAHL AND 81 OTHER FARM OWNERS IN
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AMICUS CURIAE

v.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF FOR THE OMAHA INDIAN TRIBE
IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court for the Northern District of Iowa, Western Division are Tribe's Appendix III, Preliminary Injunction; Tribe's Appendix IV, Partial Summary Judgment; Trial Court's decision on the merits reported at 433 Fed. Supp. 57, 67, Petitioners' Appendices B & C; the opinion of the Court of Appeals for the Eighth Circuit, Petitioners' Appendix A, reported at 575 F.2d 620 (CA 8, 1978).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. The Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in reversing and remanding the decision of the trial court, which in grave error:
 - a. Applied the laws of Nebraska rather than Federal laws in determining title to 2900 acres of land, which are part of 6,390 acres of land which are claimed by the Omaha Indian Tribe and the United States, which lands are situated entirely in the State of Iowa;
 - b. Upheld the claims to title by the Petitioners' "squatters", to the aforesaid 2900 acres claimed by the Indians and the United States when the Petitioners did not and cannot deraign their title from patents from the United States or otherwise and were denied the affirmative defenses of the state statute of limitations, laches and estoppel;

- c. Adopted uncritically and verbatim findings proposed by the Petitioners, "squatters," which findings were declared by the Court of Appeals to be clearly erroneous having been predicated upon speculative, conjectural and otherwise nonevidentiary opinion evidence offered by Petitioners;
- d. Found, clearly in error, that the Petitioners had sustained their burden of proving their affirmative defenses that the 2900 acres in question had, in some manner, been washed away by the Missouri River and that the original 2900 acres had been totally replaced "under the sky," in the words of the Petitioners, by accretions to riparian lands in the State of Iowa, although the trial court applied the laws of Nebraska.

2. Whether the Court of Appeals erred in holding the "federal law" should be applied to the facts, the sole issue being "whether" title to the 2900 acres had passed from the Omaha Indian Tribe and the United States to the Petitioners and in reversing the trial court for applying Nebraska law to the facts before it, rather than Federal law.

3. Whether the Court of Appeals erred in declaring that the Petitioners had the burden of proof pursuant to 25 U.S.C. 194 after the Omaha Indian Tribe and the United States had made out a *prima facie* case in support of their claims to the 2900 acres and, irrespective of the fact that the Petitioners had themselves, wholly aside from 25 U.S.C. 194, unsuccessfully undertaken to prove that the 2900 acres had been totally washed away and totally replaced by accretions.

4. Whether, pursuant to the doctrine of "Strict Necessity," the Court will consider the constitutionality of 25 U.S.C. 194 when, as here, the question of the constitutionality of the Act can be avoided (a) by sustaining the decision of the Court of Appeals that the Petitioners had

failed to sustain their burden of proof, which, wholly aside from 25 U.S.C. 194, they had assumed; (b) by sustaining the decision of the Court of Appeals that the findings of the trial court were clearly erroneous; (c) by construing the language of 25 U.S.C. 194 in a manner that will sustain its constitutionality; (d) by determining that the Indian Non-intercourse Act of 1834, of which 25 U.S.C. 194 is a part, fully comports with the will of Congress and that the Congress has compelling reason for protecting the ownership and possession of Indians in lands; (e) by construing the language of 25 U.S.C. 194 as favorable and not to the prejudice of the Indians.

5. Whether the State of Iowa has any standing in regard to its Petition by reason of the fact that there are no findings of fact or conclusions of law or reference to any claims or status of the State of Iowa by the trial court or the Court of Appeals and that for practical purposes the State of Iowa was represented by the other Petitioners before this Court and for practical purposes adopted in the entirety the conjectural, speculative and nonevidentiary opinions introduced into the record by those other Petitioners, which were rejected by the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the Constitution of the United States provides, among other things:

"Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."

Article I, Section 8, Clause 3, of the Constitution of the United States provides in part that:

"Clause 3. *The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*"

Article IV, Section 3, of the Constitution of the United States provides, among other things, that:

"Section 3. New States may be admitted by the Congress into this Union. . . .

"Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

25 U.S.C. 194, Section 22 of the Indian Non-intercourse Act of 1834, is as follows:

"§ 194. Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

STATEMENT

Claims to Title by the Omaha Indian Tribe and the United States, Trustee: By the Treaty entered into March 16, 1854,¹ between the United States of America and the Omaha Indian Tribe, in the then Territory of Nebraska, there was established the Omaha Indian Reservation. Pursuant to that 1854 Treaty, the common boundary between the Omaha Indian Reservation and the State of Iowa was the ". . . centre of the main channel of the Missouri River. . . ." Later, when Nebraska entered the Union, the center of the Missouri River became the boundary between the State of Iowa and the State of Nebraska.

¹ 10 Stat. 1043.

In 1867, during a high water period of the Missouri River, the United States of America, acting through T. H. Barrett, Surveyor, General Land Office, Department of Interior, surveyed the exterior boundaries of the Omaha Indian Reservation. Barrett did not establish the boundary at the "... centre of the Missouri River. . . ." Rather, he meandered the high water line of the river, which delimits the approximately 2900 acres, title to which is the subject matter or res of these consolidated cases here involved. It is to be observed that those 2900 acres are completely encompassed by 6,390 acres, title to which is claimed by the Omaha Indian Tribe in Civil No. 4067, United States District Court, Northern District of Iowa, Western Division.²

T. H. Barrett subdivided the western portion of the aforesaid 2900 acres of the "Barrett Survey Lands" into 80-acre allotments. Those allotments were assigned by the Bureau of Indian Affairs to individual members of the Omaha Indian Tribe. The members of the Tribe occupied those allotments and farmed them for a great many years.³

The Missouri River has historically been a wild river. In the years subsequent to 1875, it drastically changed its course and by 1923 the thalweg of that stream was to the west and south of the 2900 acres within the

² Note: In error, the Petitioners (78-160, pp. 2-3, 8) assert that they are the "record title holders . . . of the land" and include as their App. F. Tribe's Plate II. That Plate (Tribe's App. II) was prepared based upon the 1867 Barrett Survey and delimits the boundaries of the lands claimed by Petitioners in their answers to the complaints filed by the United States and the Tribe giving rise to these consolidated cases. As disclosed on the face of the Plate in question, it does not purport and, indeed, could not show the record ownership of the Petitioners—they are "squatters" being unable to deraign title from the United States.

³ Individual members of the Omaha Indian Tribe occupied their allotments until 1923 when the Missouri River moved into the position set forth on Plate IV, Pet.'s App., A-12.

Barrett Survey Line⁴ and the lands were physically located in the State of Iowa.

From the year 1923 until the present time, the thalweg of the Missouri River has been west of the Barrett line and the 2900 acres. For many years after 1923, due to the separation of the 2900 acres from the Omaha Indian Reservation by the action of the Missouri River, neither the individual Omaha Indians nor the Tribe had access to the 2900 acres in question.

*The Petitioners Are "Squatters" or "Successors of Squatters"*⁵: Approximately 40 years ago, Petitioners, "squatters," or their "squatter" predecessors, went into possession of the 6,390 acres, constituting the Blackbird Bend Area, including the 2900 acres.⁶ None of the Petitioners purport to deraign title to the 2900 acres, which they claim, from patents issued by the United States or otherwise.

Indian and Federal Occupancy of 2900 Acres: After having carefully delineated the 1867 Barrett Survey Line, the United States Bureau of Indian Affairs, acting in concert with the Omaha Indian Tribe and individual members of the Tribe, on April 2, 1975, went into peaceful possession of the 2900 acres encompassed within the Barrett Survey Line.⁷ At no time have the Petitioners operated the 2900 acres as a family farm unit. The oc-

⁴ *Ibid.*, A-12, Plate IV.

⁵ A "Squatter" is defined as "one who settles on land without right or title." *Webster's Third New International Dictionary, Unabridged; Black's Law Dictionary, Revised, Fourth Edition.*

⁶ There is not a scintilla of evidence offered by Petitioners—nor can they point to any—that they are "owners of record"—by patents—or that their predecessors "... have had possession . . ." of the 2900 acres "for as much as 80 years. . . ." Pet. Roy Tibbals Wilson, *et al.*, p. 8.

⁷ Tribe's App. III, Order of June 5, 1975, 5a; Pet.'s App., A-4.

cupancy of the land by the United States and the Omaha Indian Tribe did not displace anyone living on the 2900 acres. Principal Petitioners Harold Jackson, Otis Peterson, Roy Tibbals Wilson and R.G.P., Inc., have used those lands as part of huge agribusiness operations.

After the members of the Omaha Indian Tribe and the United States had gone into possession of the 2900 acres, Petitioner Harold Jackson, a white person, and Petitioner Otis Peterson, a white person, obtained an order dated May 15, 1975, from the District Court of Iowa, Monona County. That State Court Order was against individual members of the Omaha Indian Tribe: Edward L. Cline, Clifford Wolfe, Sr., Lawrence Gilpin and others. The Order required that they vacate the 2900 acres that they had entered with the Bureau of Indian Affairs on April 2, 1975.

*Tribe Granted Preliminary Injunction Against Petitioners, June 5, 1975:*⁸ On June 5, 1975, Honorable Edward J. McManus presiding, the trial court entered its order restraining Petitioners Jackson and Peterson from interfering with the possession and occupancy of the 2900 acres by Mr. Cline, other individual Indians, the Tribe and the United States. That Order likewise restrained the State Court from enforcing its May 15, 1975 order against Mr. Cline and other individual Indians. Judge McManus, in his Order of June 5, 1975, declared "that members of the Tribe have never totally acquiesced . . ." to the occupancy of the 2900 acres by the Petitioners.

In granting the Tribe's request for a preliminary injunction against Petitioners, Judge McManus declared that:

" . . . the public interest in this case must favor the protection of Indian possessory rights to lands set

⁸ *Ibid.*, pp. 4a, 8-9a; p. 5a, note 3.

aside in trust for them pursuant to a treaty. Congress [by the Indian Non-intercourse Act of 1834, 25 U.S.C. 177] has expressed its desire to protect the interests of Indians in real property by prohibiting conveyance of such lands without the consent of the government."⁹

Since April 2, 1975, the United States, trustee, the Omaha Indian Tribe, Mr. Cline and other members of the Tribe have been and are now in peaceful possession of the 2900 acres, which the Tribe has been farming throughout four cropping seasons.

On October 5, 1975, the Omaha Indian Tribe, by Civil No. C 75-4067, initiated its action to quiet title to 11,300 acres including the 6,390 acres lying within the Blackbird Bend Area, which encompasses the 2900 acres here involved.¹⁰

Petitioners' Affirmative Defenses: Petitioners answered the complaints filed by the United States and the Tribe on behalf of Mr. Cline and the other individual members of the Omaha Indian Tribe and for themselves. Because Petitioners cannot deraign title from patents, they relied upon two affirmative defenses: (1) that the Indians and the United States had lost title to the lands by reason of the statute of limitations, adverse possession, estoppel and laches stemming from the laws of the State of Iowa; and (2) that, in some manner, the entire 6,390 acres of land, constituting the Blackbird Bend Area, including the 2900 acres here involved, were (a) entirely destroyed and

⁹ Tribe's App. III, Order of June 5, 1975, p. 7a, second paragraph.

¹⁰ Tribe's Plate I depicts the Blackbird Bend Area and the 2900 acres within the 1867 Barrett Survey Line. It also locates two areas, known as Mission Bend and Monona Bend, which are geographically separate from the Blackbird Bend Area and which have substantially different factual backgrounds. In all, the Tribe is seeking to quiet title to approximately 6,390 acres in the Blackbird Bend Area and approximately 5,000 acres in Mission and Monona Bends.

washed away by the Missouri River and (b) were completely replaced "under the sky" by accretions to the riparian lands within the State of Iowa.

*Tribe Granted Partial Summary Judgment Dated April 5, 1976:*¹¹ Relying on Section 12 of the Indian Non-intercourse Act of 1934, now codified as 25 U.S.C. 177, the Tribe moved for a partial summary judgment against Petitioners. That motion was granted upon the premise that the affirmative defenses of the Iowa statute of limitations, adverse possession and similar defenses could not be successfully interposed against the Tribe.

In granting the Tribe's motion for partial summary judgment, Judge McManus, presiding, having first cited the recent decision of *Oneida Indian Nation v. County of Oneida*,¹² said this:

"The primacy of Federal law has been asserted through the Non-intercourse Act of 1790, 1 Stat. 137, and its successors, now codified as 25 U.S.C. § 177."¹³

Having concluded that the last cited act proscribed the sale of land by the Indians absent government consent, the trial court concluded that, if Indian lands cannot be sold without that consent, "title cannot be obtained against them by adverse possession."

Acting *sua sponte*, the trial court, by its April 5, 1976 Order, consolidated for trial those portions of Civil Nos. 4024, 4026 and 4067, relating to the identical subject res title to the 2900 acres.¹⁴

¹¹ See Tribe's App. IV, p. 10a.

¹² 414 U.S. 661, 667-8 (1974).

¹³ Tribe's App. IV, Order of April 5, 1976, p. 10a. The cited statute *inter alia* provides that the lands may not be sold without the consent of the government.

¹⁴ Pet's App., B-5, II, Subject Matter Of This Trial.

Trial on the Merits: On November 1, 1976, Judge Andrew W. Bogue presiding, the consolidated cases¹⁵ came on for trial. That trial lasted in excess of one month. At the trial, hundreds of complex exhibits and thousands of pages of expert testimony were offered in evidence.

These facts are of primary importance: Because Petitioners were "squatters,"¹⁶ and because Petitioners could not invoke the State of Iowa statute of limitations,¹⁷ they were forced, in response to the claims of the Omaha Indian Tribe and the United States, to rely solely upon the affirmative defenses that the 2900 acres had been totally washed away and totally replaced by the actions of the Missouri River. Having thus voluntarily assumed to assert the affirmative defenses last stated, the Petitioners undertook the burden of proving those defenses in the course of the trial. That assumption by the petitioners of the burden of proving their affirmative defenses was wholly independent of 25 U.S.C. 194.

1. *Petitioners Voluntarily Assumed Burden of Proof Concerning which They now Complain, Having Failed to Sustain that Burden:* A striking anomaly is presented by the Petitioners. They cannot deraign their titles from patents; they had been denied the right to interpose the affirmative defenses of the State of Iowa statute of limitations and comparable defenses.¹⁸ Thus confronted, Peti-

¹⁵ Throughout the proceedings, the trial court and the Court of Appeals recognized that one of the most crucial elements confronting the Tribe, the United States and, indeed, the courts themselves is this fact: Only part of the Tribe's case, No. 75-4067, was being tried. That circumstance arose from the fact that the full Blackbird Bend Area, title to which is asserted by the Tribe in No. 4067, encompasses more than twice as much land—6,390 acres—as are contained within the Barrett Survey Line—2900 acres.

¹⁶ See p. 7, note 5, *supra*.

¹⁷ See p. 10, *supra*.

¹⁸ See p. 7, note 5; p. 10, note 11, *supra*.

tioners pleaded the tenuous assertions that the Missouri River had obliterated 6,390 acres, including the 2900 acres, and had totally replaced that substantial land area.¹⁹

At great length, by oral testimony and demonstrative evidence, Petitioners attempted to prove their implausible contentions that the entire Blackbird Bend Area had been totally obliterated "under the sky" and completely replaced "under the sky." That contention is one of the main thrusts of the opinion of the Court of Appeals, which it rejected.²⁰

On May 4, 1977, the trial court entered its Findings of Fact, Conclusions of Law and Memorandum Opinion. Judge Bogue, adopting uncritically and verbatim the findings proposed by Petitioners, found that the Petitioners had sustained their burden of proving the implausible affirmative defenses that (1) the 2900 acres had been totally obliterated and washed away by the Missouri River; and (2) the 2900 acres had been completely replaced by the actions of the Missouri River.²¹ On the subject, the Court of Appeals said:

"... our task is not made easier by the district court's verbatim adoption of the defendant's analysis of the evidence and proposed findings of fact including the defendants' credibility assessments of the witnesses."²²

¹⁹ See pp. 9-10, *supra*.

²⁰ See note 21, *infra*.

²¹ See Pet.'s App. A-23, note 21; A-39, VI; A-41-42; A-55, VII; A-65; A-39-40, "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence"; A-56, "There exists no factual predicate whatsoever to support this [trial court's] conclusion"; A-65, "We conclude . . . [from the record] that it is entirely speculative to determine when and how the thalweg moved to the position shown on the 1923 map."

²² *Ibid.*, A-39. A-23, note 21. Reference is also made to the criticism of the Court of Appeals that "... in the present case the entire opinion of the trial court relating to the evidence and

2. *Trial Court Applied Nebraska Law to Land Situated Entirely in Iowa*: Not only did the trial court adopt uncritically and verbatim the findings of the Petitioners on all crucial factual matters, upon which its judgment was predicated, it "... applied Nebraska law in evaluating ..." the facts as analyzed by Petitioners.²³ That course was adopted by the trial court irrespective of the fact that the entire rationale of the Petitioners and, indeed, the trial court, was predicated—albeit, in error—upon the alleged accretions to riparian lands entirely within the State of Iowa.

3. *Clearly Erroneous Findings of Trial Court*: In rejecting the findings proposed by Petitioners and their analysis of the evidence, which was adopted intact by the trial court, the Court of Appeals repeatedly declared that the principal findings of the trial court were conjectural, speculative and predicated upon nonevidentiary "educated guesses" and, hence, were clearly erroneous.²⁴

findings of fact is essentially a memorandum written by the defendants. Under the circumstances we feel compelled to repeat the admonition of the United States Supreme Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964): "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. *Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.* Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States v. Forness*, 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case. (Emphasis added). . . ."

²³ Pet.'s App., A-13.

²⁴ Pet.'s App., A-39-40; A-44, "We find the evidence concerning bar C to be highly conjectural and inconclusive. . . ." A-45, "... we regard the evidence of the defendants as insubstantial." A-46, "Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility." A-47, "Defendants' experts also relied upon inferences. . . . The record, in our judgment, requires us to give little or no probative effect to the ultimate conclusion

ARGUMENT

*Petitioners Voluntarily Assumed the Burden of Proof and Failed to Sustain that Burden—The Constitutionality of 25 U.S.C. 194 Need Not Be Considered*²⁵: Justice Brandeis reaffirmed the constraints to which the Court adheres respecting its powers to pass upon the constitutionality of an "Act of Congress." Among those enunciated canons, these are most pertinent:

"2. . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'

"4. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

"7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised,

it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"²⁶

Those rules are especially pertinent here. The constitutionality of 25 U.S.C. 194 need not be considered. There

reached from these factual premises." A-49, note 49. A-59, The Court below made reference to the fact that a principal witness of the Petitioners conceded that the conclusions expressed were "educated guesses." A-65, "The essential inferences cannot be left to speculation or conjecture."

²⁵ Justice Brandeis, in his concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 346-8 (1936), reviewed the rules and decisions relative to the circumstances pursuant to which a constitutional issue will be considered by the Court. Justice Brandeis states: "The Court developed . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

²⁶ *Ibid.*, 346-48 (Emphasis added).

are abundant reasons for sustaining the opinion of the Court of Appeals without resolving that issue.

As reviewed above and recognized by the Court of Appeals, the Tribe established its *prima facie* case by proving: (1) Title pursuant to the 1854 Treaty; (2) the 2900 acres were surveyed by the United States; (3) for years individual tribal members occupied the lands; (4) when the cases here involved came on for trial, the United States, trustee, individual members of the Omaha Indian Tribe and the Tribe itself were in peaceful possession of the 2900 acres.²⁷

Bereft of other defenses, Petitioners undertook to prove the obliteration of the 6,390 acres, including the 2900 acres and the replacement of it. They failed.²⁸ The Court of Appeals rejected the evidence accepted by the trial court.²⁹ The Petitioners complain that the Court of Appeals erroneously labeled their purported evidence as being speculative, conjectural "educated guesses," and unsupported by substantial facts. Yet, Petitioners make no reference to the transcript of the trial court's record or to the exhibits to support their contentions against the Court of Appeals. As noted below, Petitioners suggest that the Court review the findings, which were rejected by the Court of Appeals. Obviously, that course of conduct can be of no assistance to the Court in evaluating Petitioners' complaint that the findings were not "clearly erroneous," as determined by the Court of Appeals.³⁰ Petitioners failed to document their assertions.

²⁷ Pet.'s App., A-2, A-4, A-25.

²⁸ See p. 12, note 21, *supra*.

²⁹ Pet. Roy Tibbals Wilson, 78-160, pp. 9, 29.

³⁰ *Ibid.*, p. 29, para. 5. Petitioners refer to the decision of the Court of Appeals that their findings adopted by the trial court were clearly erroneous. Rather than seeking to demonstrate how the Court of Appeals erred in rejecting findings based upon "educated guesses" and conjecture, Petitioners refer to the findings which were rejected—a manifest nonsequitur.

Because the application of 25 U.S.C. 194 was not necessary for the Court of Appeals to reach its conclusion, there is no need for the Court to determine the constitutionality of 25 U.S.C. 194. Thus, this immutable principle becomes applicable:

"If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided."³¹

In *Light v. United States*,³² the Court declared that, where the judgment "was right on the merits," the Court will decide the issues "without reference to questions arising under the Federal Constitution. . . ." In *Peters v. Hobby*³³ the Court stated:

"We find, however, that the case can be decided without reaching the constitutional issues.

"From a very early date, this Court has declined to anticipate a question of constitutional law in advance of the necessity of deciding it."

As if speaking to Petitioners and *amici curiae* alike, who point to possible consequences involving conjectural circumstances, which might be tried involving the constitutionality of 25 U.S.C. 194, the Court made this statement in *Raines*:

"Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. . . .' The delicate power of pronouncing an Act of Congress unconstitutional

³¹ *Alma Motor Co. v. Timken Co.*, 329 U.S. 129, 136 (1946).

³² 220 U.S. 523, 537-8 (1911).

³³ *Peters v. Hobby*, 349 U.S. 331, 338 (1955).

is not to be exercised with reference to hypothetical cases thus imagined."³⁴

Because reversal of the trial court was inevitable by reason of (1) its application of Nebraska law to lands in Iowa; (2) its reliance upon nonevidentiary matters in adopting its findings; (3) its copying verbatim and uncritically the unsupported findings of Petitioners; and (4) its refusal to acknowledge the primacy of Federal law respecting Indian affairs, the question of the constitutionality of 25 U.S.C. 194 need *not* be reached and, it is respectfully submitted, *should not* be reached.

The Court of Appeals reversed and remanded the judgment of the trial court predicated upon its ". . . firm conviction that a mistake had been committed."³⁵ Petitioners do not support their objections to the Court of Appeals' rejection³⁶ of the trial court's findings. Thus, Petitioners request the Court to assume the time-consuming task of reviewing thousands of pages of transcript and hundreds of pages of complex and highly technical exhibits to determine if Petitioners' complaint against the Court of Appeals has substance.³⁷

Petitioners Request an Interpretation of 25 U.S.C. 194, Which Will Result in a Nullity: It has been emphasized above that there is no need to reach the issue of the constitutionality of 25 U.S.C. 194. Yet, the Tribe believes it is constitutional and relied upon it. 25 U.S.C. 194 is as follows:

"§ 194. Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white per-

³⁴ *United States v. Raines*, 362 U.S. 20, 21 (1960).

³⁵ *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

³⁶ See p. 15, note 30, *supra*.

³⁷ See *supra*, review of comments by Justice Brandeis, p. 14, note 25

son on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

The Court of Appeals declared 25 U.S.C. 194 "clearly evidences a protectionist policy with regard to Indians."³⁸ The trial court expressed it as follows: ". . . public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty."³⁹

Petitioners seek to avoid the historic congressional policy of protecting the Indians in their rights to their lands.⁴⁰ They assert that 25 U.S.C. 194 is limited to an "individual Indian" against an "individual white person."⁴¹ As stated, Petitioners' interpretation precludes the United States, trustee, from appearing on behalf of an "Indian" involving litigation within the purview of 25 U.S.C. 194.⁴² Similarly, it would preclude a Tribe from acting on behalf of its members.⁴³ Equally clear—if the interpretation of 25 U.S.C. 194, as asserted by Petitioners, is accepted—an "Indian" would be precluded from invoking 25 U.S.C. 194 when participating in multiple-party/multiple-issue litigation of the type normally necessary in real estate litigation. It would, in-

³⁸ Pet.'s App., A-22.

³⁹ See Tribe's App. III, p. 7a, second paragraph. See, in particular, case of Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-8 (1974).

⁴⁰ Pet. Roy Tibbals Wilson, 78-160, p. 13.

⁴¹ *Ibid.*, p. 18.

⁴² See Pet. R.G.P. Inc., 78-161, p. 11 which states that 25 U.S.C. 194 relates to "one member" of the Indian race and "one member" of the white race.

⁴³ *Ibid.*

deed, be clear violation of the trust obligation to prevent the United States from entering cases of the character initiated by "white person" Jackson against "individual Indian" Cline. Thus, it is necessary totally to reject the interpretation by Petitioners for it renders 25 U.S.C. 194 vacuous to limit it to situations where there is a single Indian against the powerful Petitioners and the State of Iowa.⁴⁴

Applying Petitioners' concepts to Article I, Section 8, Clause 3 of the Constitution of the United States would make suspect innumerable court decisions in regard to the applicability of that Constitutional Clause. That proviso of the Constitution declares that Congress shall regulate commerce with "Indian Tribes." To adopt the concept of Petitioners, the trust obligation of the United States, which stems from the Commerce Clause, would prevent the United States from acting on behalf of individual Indians. That, however, has not been the principle adhered to by this Court. Recently, in *Antoine v. Washington*,⁴⁵ the Court recognized that the United States has a trust obligation not only to "Tribes," but to individual Indians.

The plain reading of 25 U.S.C. 194 rejects the strict construction urged by Petitioners and *amici curiae* alike. That statute relates to ". . . all trials about the rights of property in which an Indian may be a party. . . ." The probative language of the statute relates to all trials about the rights of property in which an Indian may be involved. In seeking to achieve that explicit objective of Congress, the Court adheres to these principles of construction:

"[The intention of Congress] . . . is to be ascertained, not by taking the word or clause in question from its

⁴⁴ Pet. State of Iowa, 78-162, p. 10.

⁴⁵ 420 U.S. 194 (1975).

setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will.”⁴⁶

It would be in clear violation of that expressed principle of statutory construction to adopt the concepts of Petitioners. If 25 U.S.C. 194 were limited to an “Indian” against a “white person,” involving a particular tract of land, the Act would have been nullified immediately upon the death of the Indian. Thereafter, the “Indian” heirs would be required to act to preserve the decedent’s property. Hence, it would no longer be an Indian against a white person; it would be several Indian heirs against the white person. It is submitted that Congress, wishing to protect Indians “in all trials” never contemplated that the death of a single Indian would render nugatory 25 U.S.C. 194. Under those circumstances, the Court rejects the maxims “ejusdem generis” and “expressio unius es exclusio alterius.” It recognized that those maxims are but aids in construction and, when they would nullify the will of Congress, as proposed by Petitioners in connection with 25 U.S.C. 194, they are rejected.⁴⁷

Statutes Are to Be Construed Most Favorably for the Indians: Petitioners and *amici curiae* seek to have 25 U.S.C. 194 construed in a manner diametrically opposed to the principles established and long adhered to by the Court in regard to legislation pertaining to Indians. Petitioners would have applied the strictest rules of construction in clear violation of the concepts as enunciated by the Court in *Choate v. Trapp*.⁴⁸ In rejecting the contention that a statute should be strictly construed in re-

⁴⁶ *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84, 93-4 (1934).

⁴⁷ *Securities and Exchange Commission v. C. M. Joiner Leasing Corporation*, 320 U.S. 344, 351, note 8 (1943).

⁴⁸ 224 U.S. 655, 675 (1912).

gard to the Indians in keeping with the principles generally adhered to, the Court said this:

“The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than an hundred years. . . .”

Numerous decisions, which adhere to that concept, support the contention that statutes of the character involved are not to be construed to the prejudice of the Indians.⁴⁹ Most recently, the Court declared:

“The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.”⁵⁰

In *McClanahan*, the Court reviewed the concepts of construction and declared that Congressional intent must be clear to overcome “. . . the general rule that ‘[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.’”⁵¹

It is respectfully submitted that there should be adherence to these principles of statutory construction: (1) The Court will abstain from passing upon the constitutionality of 25 U.S.C. 194 for “. . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the

⁴⁹ *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 353-4 (1941); *Inter-marriage Cases*, 203 U.S. 76, 94 (1906).

⁵⁰ *Antoine v. Washington*, 420 U.S. 194, 199 (1975).

⁵¹ *McClanahan v. Arizona*, 411 U.S. 164, 174 (1973).

question may be avoided.”⁵² (2) The Court, in seeking to avoid the issue of constitutionality, will determine the purpose which Congress desires to achieve rather than to seize upon isolated words and examine them “apart” from the congressional objective.⁵³ (3) The Court will construe doubtful statutory language in a manner favorable to the Indians and will not construe a statute to the prejudice of the Indians.⁵⁴ Those cogent concepts of statutory construction, it is submitted, will sustain the will of Congress regarding 25 U.S.C. 194 and will negate the constitutional issue which Petitioners so strongly urge.

“... a compelling governmental interest”⁵⁵ *Is Served by the Indian Non-intercourse Act of 1834, of which 25 U.S.C. 194 Is a Part*: In seeking to avoid the rationale of the Court’s recent *Mancari* decision,⁵⁶ Petitioners make reference to “. . . the fulfillment of Congress’ unique obligation to the Indians . . .” alluding to it, in error, as a “vague obligation.” The primacy of Federal law, upon which the national trust obligation is predicated, requires the United States to fulfill its “unique obligation” in conformity with “the most exacting fiduciary standards.”⁵⁷

From the earliest moments of its history, the United States adopted a policy of protecting Indians in their ownership and possession of their lands and to “. . . guarantee the rights of Indians to specified areas of land.”⁵⁸ That policy of protecting Indian ownership and

⁵² See note 25, *supra*.

⁵³ See note 46, *supra*.

⁵⁴ See *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

⁵⁵ *California v. Bakke*, Slip Opinion, June 28, 1978, p. 30.

⁵⁶ *Pet. Roy Tibbals Wilson*, 78-160, p. 12 *et seq.*, 17. See *Morton v. Mancari*, 417 U.S. 535, 547 *et seq.* (1974).

⁵⁷ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

⁵⁸ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). See *United States v. Rickert*, 188 U.S. 432, 442-3 (1903); *Heckman v. United States*, 224 U.S. 413, 437 (1912).

possession is part and parcel of the broad obligation of the United States as trustee for the Indians. *Mancari* relates to but a single aspect of the trust obligation owing by the United States to the Indians. It must be read together with—not separate from—the obligation of the Trustee United States to protect Indian property.⁵⁹

The history of the Indian Non-intercourse Act of 1834, of which 25 U.S.C. 194 is a part, would preclude Petitioners’ conclusions. Reference in that regard is made to the fact that the Court’s decision of *Worcester v. Georgia* was rendered in 1832, two years antecedent to the passage of the Act in question. The trust obligation, in regard to protection of Indian rights, is reviewed in great detail in the case last cited.⁶⁰

Congress adopted the “Ordinance of 1787; the Northwest Territorial Government.”⁶¹ Among other things, this Ordinance of 1787 provided:

“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent. . . .”

That Ordinance provides that Indian rights “. . . shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress. . . .”

In 1790, Congress adopted the first Indian Non-intercourse Act.⁶² The objective was then, as it is now, to prevent the loss of Indian lands through conveyance or otherwise without governmental consent. Justice Marshall alluded to the Act of 1802 and declared that the

⁵⁹ See effort of Petitioners to distinguish the phase of the trust obligation involved in *Mancari* from the phase of the trust obligation here involved. *Pet. Roy Tibbals Wilson*, 78-160, p. 17.

⁶⁰ 31 U.S. 515, 549, 556 (1832).

⁶¹ Act of August 7, 1787, Ch. 8, 1 Stat. 50, Art. III.

⁶² 1 Stat. 137.

boundaries of the Indian lands and the rights of the Indian to those lands are "... not only acknowledged..." but those property rights are "guarantied [sic] by the United States."⁶³ Chancellor Kent in his commentaries, written contemporaneously with the formulation of the policy to protect Indian rights, declared that, where Indian lands are surrounded by a non-Indian population, the non-Indians are "penetrated with a perfect contempt for Indian rights."⁶⁴ Congress recognizes today that the need to protect Indians and their property from unscrupulous land exploiters is no less pressing now than it was when the Indian Non-intercourse Act was enacted in 1834, when Chancellor Kent wrote and when Justice Marshall rendered the *Worcester* decision.

There has been an unbroken line of legislation by Congress implementing the policy of protecting Indian lands. When it became apparent to Congress that the policy of issuing allotments to individual Indians resulted in the loss of those lands through the sale to non-Indians, Congress prohibited the issuance of further allotments.⁶⁵ Congress has likewise restored to tribal ownership surplus lands within Indian reservations, which had originally been opened to entry.⁶⁶

Most recently, Congress enacted the Indian Self-Determination Act,⁶⁷ which, among other things, provided that the Indians could be represented in litigation by counsel of their own choosing.⁶⁸

⁶³ *Worcester v. Georgia*, 31 U.S. 515, 556 (1832). See also Pet.'s App., A-17.

⁶⁴ 1 Kent's Commentaries, 286 (13th Ed., 1884).

⁶⁵ 25 U.S.C. 461.

⁶⁶ 25 U.S.C. 463.

⁶⁷ 25 U.S.C. 450.

⁶⁸ 25 U.S.C. 450i(f).

Repeatedly, the Court has recognized and upheld the power of Congress when it has acted to provide means which fulfill the "compelling governmental interest" to protect Indians in their ownership and possession of their lands, all as contemplated by 25 U.S.C. 194.⁶⁹ Indeed, that concept was initially adhered to by the trial court.⁷⁰

25 U.S.C. 194 Does Not Constitute "Invidious Racial Discrimination" Against Petitioners⁷¹: Reliance by Petitioners and amici upon *California v. Bakke* to support their contentions that 25 U.S.C. 194 constitutes an "invidious racial discrimination" against them is clearly in error. A thorough analysis of *Bakke* reveals that, if it has any relationship to 25 U.S.C. 194, it supports the decision of the Court of Appeals. In *Bakke*, the Court referred to *Ashwander v. TVA* and directed that supplemental briefs be submitted to determine if it were possible that additional information might "... obviate resort to constitutional interpretation."⁷² It is quite apparent, as emphasized above, that the failure of Petitioners here to sustain the burden they voluntarily assumed is in itself sufficient to "obviate" the necessity of this Court to turn to the constitutionality of 25 U.S.C. 194.⁷³ Hence, the question of whether the Act is "invidious discrimination" need never be reached.

⁶⁹ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 *et seq.* (1974). See p. 669, note 5, referring to "almost countless cases" recognizing the primacy of federal law where Indian interests are involved. See also *United States v. Rickert*, 188 U.S. 432, 442-3 (1903); *Heckman v. United States*, 224 U.S. 413, (1912); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345, 347 (1941).

⁷⁰ Tribe's App. III, Order of June 5, 1975, p. 7a, second paragraph; Tribe's App. IV, pp. 12a-13a.

⁷¹ See Pet. Roy Tibbals Wilson, 78-160, p. 11, *et seq.*

⁷² *California v. Bakke*, Slip Op., pp. 12, 14.

⁷³ See p. 14, note 25, *supra*.

Bakke, however, discloses that enactments of the character of 25 U.S.C. 194 to assist a minority in its struggle to survive against an overwhelming non-Indian population will be sustained as being within the purview of the Constitution. On the subject, *Bakke* states:

"Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance . . . [as has been done in regard to Indian properties]."

Bakke then continues:

"When they [statutes] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is *precisely tailored to serve a compelling governmental interest*."⁷⁴

Placing the burden of proof "upon the white person" when an Indian has made out "a presumption of title in himself from the fact of previous possession and ownership" comes squarely within the purview of the rule enunciated in *Bakke*. There is a "compelling governmental interest," as urged above, to sustain the Indians in the possession of their property.⁷⁵ 25 U.S.C. 194 is specifically designed for that purpose. In the words of *Bakke*, the United States of America, as trustee for the Omaha Indian people and the Omaha Tribe, has a "substantial interest" in protecting those people and their rights in regard to the lands reserved by them in their Treaty of 1854. To Petitioners' charges that 25 U.S.C. 194 accords an unconstitutional preferred status to Indians, reference is again made to *Mancari*, where it states:

⁷⁴ California v. Bakke, Slip Op., June 28, 1978, p. 30 (Emphasis added).

⁷⁵ *Ibid.*

"On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment."⁷⁶

Mancari refers to special legislation for Indians, making this salient point in regard to the constitutionality of special acts:

"Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."⁷⁷

Having summarized numerous cases upholding special legislation favoring the Indians, the Court established the criterion which governs the constitutionality of special legislation. It said this:

"As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."⁷⁸

25 U.S.C. 194 clearly comes within the purview of that declaration. It is respectfully stated that the concepts of the Court have consistently sustained acts having the objective of 25 U.S.C. 194. For that reason, it is believed that 25 U.S.C. 194 is immune from Petitioners' attacks upon it.

⁷⁶ 417 U.S. 535, 554-5 (1974).

⁷⁷ *Ibid.*, at 552.

⁷⁸ *Ibid.*, at 555.

*"The question whether title to land which has once been the property of the United States has passed from it must be resolved by the laws of the United States. . . ."*⁷⁹

The Court, in *Oneida*, having recognized the primacy of Federal law respecting Indian lands and the exclusive and plenary power of Congress to administer them, said:

"Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law."⁸⁰

That immense power is spelled out with specificity in the Constitution.⁸¹ The comprehensive and exclusive power of Congress over federal and Indian lands includes the power to prescribe the time, conditions and mode of transfer of the lands and to determine whether, when and if title is

⁷⁹ This statement is taken from the Constitution of the United States of America, Revised and Annotated, 1972, p. 849, and is supported by an abundance of authority.

⁸⁰ 414 U.S. 661, 667 (1974).

⁸¹ It is, of course, elementary that the Omaha Indian Treaty comes within the purview of Article VI of the Constitution which, among other things, declares that: "Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." The relationship between the Trustee United States and the Omaha Indians stems from the Commerce Clause, Art. I, Sec. 8, Cl. 3, which provides that: ". . . Congress shall have Power . . . To regulate Commerce . . . among the several States and with the Indian Tribes. . . ." Federal protection of Indian property comes, in part, from the Property Clause of the Constitution, Art. IV, and also arises in connection with the Federal-state relationship which, among other things, provides for the admission of states into the Union in declaring: "Section 3. New States may be admitted by the Congress into this Union. . . . Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

to pass from the United States.⁸² As the Court stated in the *Camfield* decision, "A different rule would place the public domain of the United States completely at the mercy of state legislation."⁸³

An exhaustive review of the pertinent authorities on the subject of the primacy and applicability of Federal law is set forth in the decision of the Court of Appeals. That in-depth review should suffice to dispose of the contentions of the Petitioners that, in some manner, the law of Iowa could control. In passing, it must be observed that the Petitioners' insistence that the laws of Iowa⁸⁴ should apply and the concomitant assertion that the trial court's opinion should be sustained is most unusual in view of the fact that the trial court ". . . applied Nebraska law in evaluating the facts of the case."⁸⁵

Fully to support the application of Federal law, the Court of Appeals made this statement:

"The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands. Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. Presumptively, at least, this right has never been extinguished."⁸⁶

⁸² *United States v. Santa Fe RR. Co.*, 314 U.S. 339, 345 (1941); See also p. 347. There it is declared, respecting title to Indian lands, that the "power of congress . . . is supreme." See, *Light v. United States*, 220 U.S. 523 (1911).

⁸³ *Camfield v. United States*, 167 U.S. 518, 525 (1897).

⁸⁴ *Pet. Roy Tibbals Wilson*, 78-160, p. 23, paragraphs 3 *et seq.*

⁸⁵ *Pet.'s App.*, A-13, III, *Choice Of Law*; See A-31, note 30 for discussion of the Nebraska law as applied by the trial court.

⁸⁶ *Pet.'s App.*, A-17.

Petitioners placed great reliance upon the Court's recent *Oregon v. Corvallis* decision.⁸⁷ That case is easily distinguished from the issues here presented. In *Corvallis*, title had passed from the United States; a boundary dispute was not there involved; and the Indian issue was in no sense presented. The Court of Appeals recognized the pertinency of *Corvallis* and from it takes this quotation:

"If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary."⁸⁸

Continuing on the subject of state boundaries, the Court of Appeals pointed out:

"Federal common law is applicable even where only a single state is involved in a controversy with a private party. . . ."

In support of that conclusion, the Court of Appeals cites numerous decisions.⁸⁹ It is imminently clear that the Court of Appeals had no alternative but to apply the Federal law in view of the fact that the Tribe's claims to title "arises under federal law. . . ." ⁹⁰

The opinion of the Court of Appeals comports fully with—does not conflict with—the *Corvallis* decision. In *Corvallis*, the Court stated:

"We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the

⁸⁷ 429 U.S. 363 (1977).

⁸⁸ Pet.'s App., A13. 429 U.S. 363, 375 (1977).

⁸⁹ Pet.'s App., A-14.

⁹⁰ Pet.'s App., A-20

property of the United States has passed, that question must be resolved by the laws of the United States. . . ." ⁹¹

Here, the entire issue is "*whether*" title to the 2900 acres passed from the Tribe and the United States, trustee, by obliteration and the replacement of it "under the sky" by the Missouri River. Under the concepts of *Corvallis*, it is free from doubt that the issues, here presented, must be resolved pursuant to Federal law.

Here, there is a single paramount issue: Has title to the 2900 acres, part of the Omaha Indian Reservation, as delineated by the 1854 Treaty and surveyed in 1867 by the United States, passed out of the Omaha Indian Tribe and from the United States, as trustee for the Tribe? Response to that issue is contained in the decision of the Court of Appeals. This statement by the Court of Appeals robs the contentions of the Petitioners and *amici* that state law is applicable: "The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands." ⁹² Predicated upon that succinct statement of the case, the Court of Appeals applied the historic and present-day principles of law in these terms: "State law dealing with riparian rights cannot unilaterally extinguish or deprive Indians of their tribal lands." ⁹³

The Court of Appeals is imminently correct in declaring that the issue here of "*whether*" title had passed from the Omaha Indian Tribe and the United States must necessarily be determined by the "federal law." That legal principle has been repeatedly adhered to by the Court.⁹⁴

⁹¹ 429 U.S. 363, 377 (1977).

⁹² Pet.'s App., A-17, see note 15.

⁹³ *Ibid.*, at A-18.

⁹⁴ See Pet.'s App., A-25, V, *Law Of Accretion And Avulsion*, and cases there cited.

Petitioners and Amici Challenge the Decision of the Court of Appeals in Regard to the Law Pertaining to Accretion and Avulsion: The issue of Federal law vis-a-vis state law, which Petitioners and amici assert in regard to the principles of accretion and avulsion, was markedly dissipated by their own actions. As emphasized previously, they assumed the burden of proving that, in some manner, the 2900 acres had been replaced "under the sky" by accretions from the riparian lands in Iowa. They failed.⁹⁵ It would seem that, under those circumstances, the issue of accretion and avulsion would be laid to rest and that, in the state of the record, the problems to which Petitioners refer is academic.

Reference is, nevertheless, made to the contentions of Petitioners and amici that the Court of Appeals did not adopt the Iowa law. Federal law is controlling, all as reviewed above.⁹⁶ Petitioners assert that identifiable land is the sole criterion under the laws of Iowa to establish an avulsion.⁹⁷ Ignored by Petitioners is this fact: The trial court applied *not* Federal law; *not* Iowa law, but Nebraska law. Wholly aside from that manifest error by the trial court, this fact—contrary to the contentions of Petitioners—is of importance: The Court of Appeals did not reject identifiable lands as an element to be considered in determining if an avulsion had taken place. Rather, that Court of Appeals stated: "... evidence of identifiable land in place may have some probative value. . . ." ⁹⁸

What the Court of Appeals declared is this: To limit the criterion as to the proof required to sustain a claimed avulsion to "identifiable lands" is to

⁹⁵ See p. 12, note 21; pp. 13-14, note 24, *supra*.

⁹⁶ See p. 13, note 23; p. 22, note 55, *supra*.

⁹⁷ See Pet. Roy Tibbals Wilson, 78-160, p. 27.

⁹⁸ Pet.'s App., A-35.

"... limit the rule to the rare situation involving only an *obvious* neck cut-off where intervening land is not submerged. The history of the rule [respecting avulsion], the case law developed under it, and the policy underlying the doctrine all support a broader application."⁹⁹

It must be recognized that the Court of Appeals did not reverse the trial court by reason of the fact that it referred to identifiable lands, but because

"We find the District Court too narrowly focuses on identifiable land in place as the sole criterion of avulsion without giving proper weight to the plaintiffs' theory of their case and to the factual record presented."¹⁰⁰

It is urged that the Court of Appeals correctly applied the laws respecting avulsions,¹⁰¹ and that Petitioners are in error when they seek to challenge the Court of Appeals' decision on the subject in question.

Status of the State of Iowa is Unclear: Iowa asked whether it may be divested of lands by 25 U.S.C. 194.¹⁰² Iowa likewise inquires as to whether "federal law requires divestiture of Iowa's apparent good title to real property. . . ." ¹⁰³ An examination of the trial court's Findings, Conclusions of Law and Memorandum Opinion, are devoid of any reference to a divestiture of title claimed by the State of Iowa.^{103a}

There is no assertion that the Tribe seized the bed of the Missouri River or deprived Iowa of it. There is no

⁹⁹ Pet.'s App., A-35-36.

¹⁰⁰ Pet.'s App., A-27.

¹⁰¹ See note 94, *supra*.

¹⁰² Pet. State of Iowa, 78-162, p. 2.

¹⁰³ *Ibid.*, p. 3.

^{103a} Pet.'s Apps. B & C.

contention that the Tribe has impinged upon Iowa's sovereignty. What does appear is that Iowa joined the other Petitioners in their effort to prove that the 2900 acres was obliterated and, in some manner, totally restored.¹⁰⁴ Yet, Iowa does not contend that it gained title by reason of that implausible, physical phenomena upon which the other Petitioners rely. Iowa, it seems, and the other Petitioners simply failed in the burden of proof which they voluntarily assumed wholly aside from 25 U.S.C. 194 and the Court of Appeals reversed, all as has been reviewed in detail.

Iowa asserts that it is not a "white person" and that the Omaha Indian Tribe is not an "Indian" within the purview of 25 U.S.C. 194. Response to Iowa's challenges as to 25 U.S.C. 194 has been reviewed in detail above.¹⁰⁵ Iowa and all the other Petitioners rely heavily upon the *Perryman* case.¹⁰⁶ That decision, whatever its merits on the facts there presented, has no bearing on these consolidated cases. In depth, there has been reviewed above the fact that Congress has the power to protect the Indians in their ownership and possession. It did so in regard to "... all trials about the right of property ..." in which an Indian may be involved. It most assuredly, as stated, does not preclude the United States of America from appearing on behalf of the "Indian." Similarly, the Tribe may appear on behalf of an "Indian" involved in litigation of that character. It is unquestioned that the United States and the Tribe created a presumption of title in the Indians by the fact of previous possession and ownership.¹⁰⁷ Quite obviously, there was a compelling

¹⁰⁴ See p. 20, note 46, *supra*.

¹⁰⁵ See p. 18, note 38, *supra*.

¹⁰⁶ *United States v. Perryman*, 100 U.S. 235 (1880).

¹⁰⁷ See p. 15, note 27, *supra*.

governmental interest in the United States protecting the Indians in their possession of the 2900 acres.¹⁰⁸

The Court of Appeals very properly, based upon its analysis of the numerous errors of the trial court, reversed that court. Because of the magnitude of the errors of the trial court, it is very clear that the issue of the constitutionality of 25 U.S.C. 194 need not be and will not be considered under the prevailing circumstances.¹⁰⁹ Like the other Petitioners, Iowa would limit the case to a single Indian vis-a-vis the State of Iowa. Quite obviously, Congress did not have such an intentment when it referred to "all trials" in 25 U.S.C. 194. Manifestly, "all trials" will include complex, multi-party/multi-issue cases of the character involved in these consolidated cases.¹¹⁰

On the subject, the manner in which a statute should be read involving either the states or the United States, the Court declared this:

"Is the United States a resident within the meaning of the words 'residents, corporate or otherwise'? We think it is. It many times has been held that the United States or a state is a 'person' within the meaning of statutory provisions applying only to persons. . . . in *Stanley v. Schwalby*, 147 U.S. 508, 517 . . . it was held that the word 'person' used in the statute there under consideration would include the United States 'as a body politic and corporate.' " ¹¹¹

The controlling element as to whether the State of Iowa comes within the purview of 25 U.S.C. 194 is, as stated, the congressional objective in passing the Act in question.

¹⁰⁸ See p. 22, note 55, *supra*.

¹⁰⁹ See p. 12, note 21; pp. 13-14, note 24, *supra*.

¹¹⁰ See p. 19, *supra*.

¹¹¹ *Helvering v. Stockholms &c. Bank*, 293 U.S. 84, 91, 92 (1934).

Manifestly, it was intended to protect Indians in their ownership and possession of their lands. Under the circumstances, the Court has regularly sustained acts of that character, particularly in regard to Indians where the principles of construction are to rule favorably for the Indians and never to their prejudice.¹¹²

CONCLUSION

Accordingly, it is respectfully submitted that the Petitions for Certiorari should be denied.

Respectfully submitted,

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Appendices

¹¹² See p. 20, *supra*.

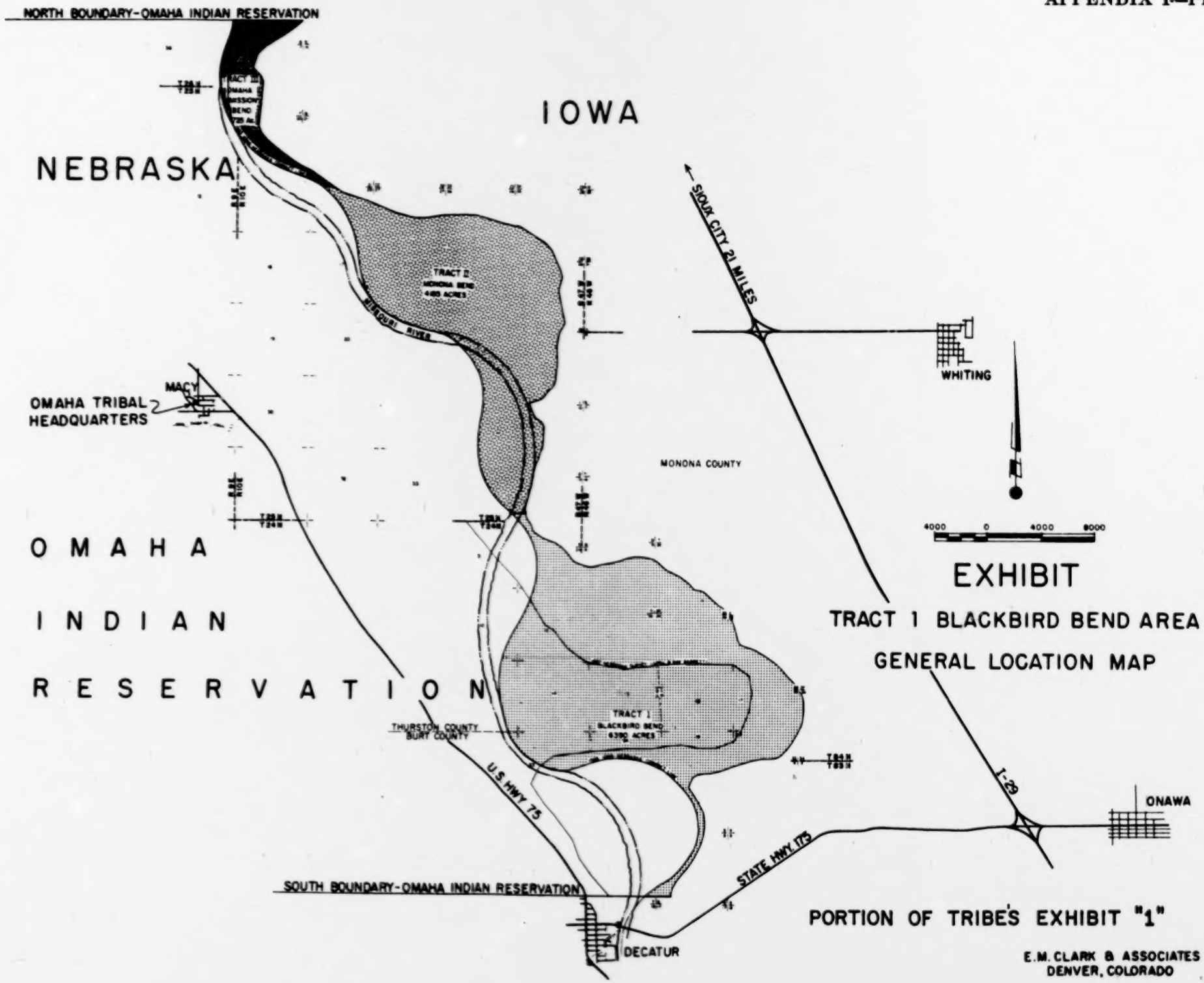
APPENDICES

APPENDIX I—PLATE I: Blackbird Bend Area, General Location Map

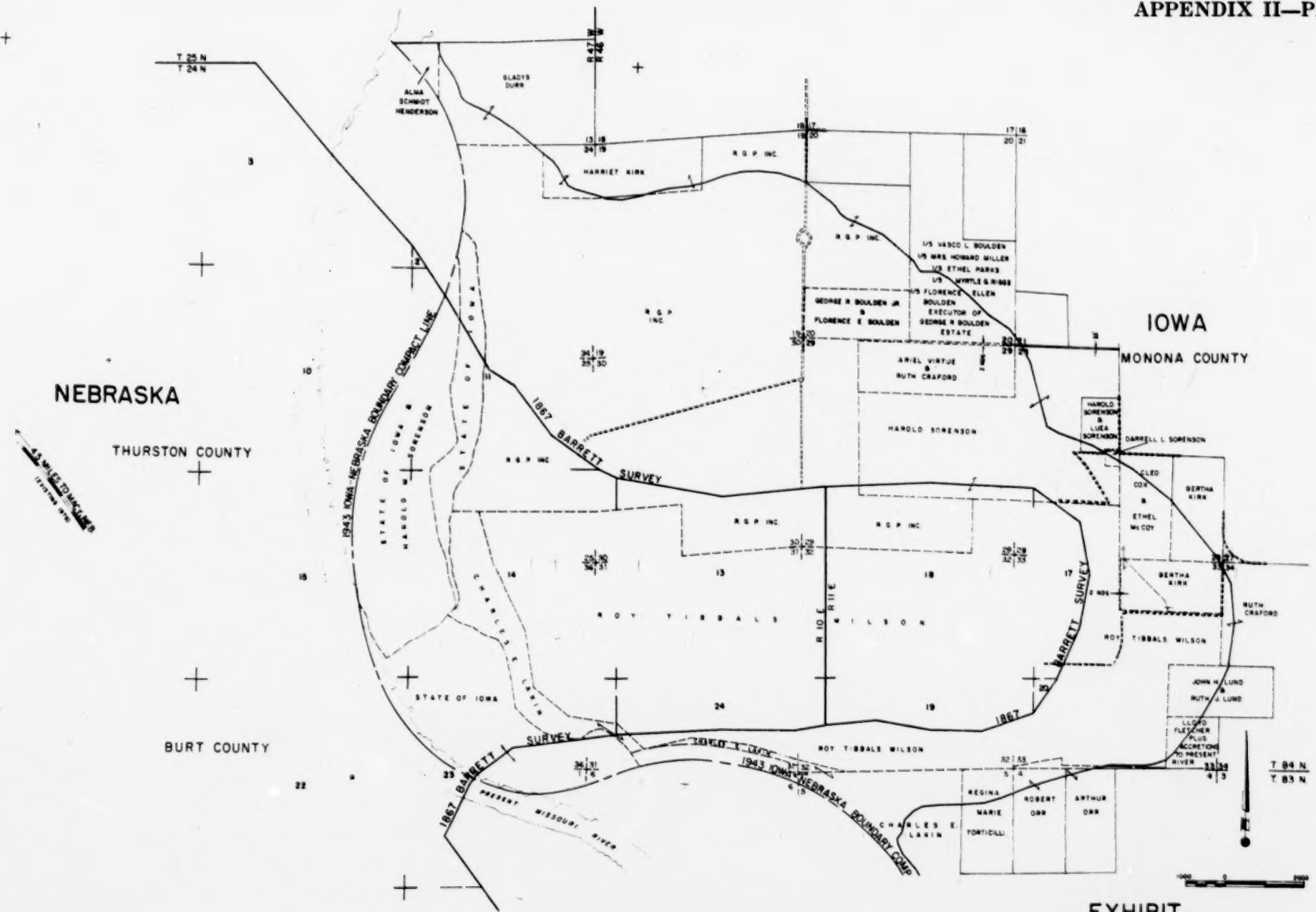
APPENDIX II—PLATE II: Blackbird Bend Area Land Ownerships Compiled From Defendants' [Petitioners'] Answers, Case C75-4067

APPENDIX III: Order of Chief Judge Edward J. McManus, filed June 5, 1975, in the United States District Court for the Northern District of Iowa, Western Division

APPENDIX IV: Order of Chief Judge Edward J. McManus, filed April 5, 1976, in the United States District Court for the Northern District of Iowa, Western Division



APPENDIX II—PLATE II



PORTION OF TRIBE'S EXHIBIT "78"

EXHIBIT
TRACT 1 BLACKBIRD BEND AREA
LAND OWNERSHIPS
COMPILED FROM
DEFENDANTS' ANSWERS
CASE C75-4067

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

[Filed Jun. 5, 1975]

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,
Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

HAROLD JACKSON, et al.,
Defendants.

ORDER

This matter is before the court on resisted cross-applications for preliminary injunctions, filed in No. C 75-4024 on May 19, 1975 by plaintiff and on May 22, 1975 by defendants, and filed in No. C 75-4026 on May 20, 1975 by plaintiff and on May 28, 1975 by defendants. The applications for preliminary injunctions have been submitted for decision by the court upon the briefs and the record filed herein.

The controversy here involves the ownership of and possessory rights to an area of land comprising approximately 3000 acres bordering on the Missouri River in

Western Iowa. During the mid-nineteenth century, the lands in question were located on the Nebraska side of the Missouri River, circumscribed by an oxbow of the River known as Blackbird Bend.

As indicated by the Barrett survey of 1867, the Blackbird Bend area of Nebraska was encompassed within the boundaries of the Omaha Indian Reservation, established pursuant to the treaty of March 16, 1854, 10 Stat. 1043,¹ with title in the United States as trustee for the Omaha Indian Tribe. The dispute arises as to the subsequent geophysical history of the contested lands.

The plaintiff in each case contends that the Blackbird Bend area became located on the eastern bank² through an avulsive change in the course of the Missouri River caused by channelization projects carried on by the Corps of Engineers during the 1940's. An avulsive change in the River's course would not alter the status of title to the riparian lands. *Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1917); *Nebraska v. Iowa*, 145 U.S. 519, 12 S.Ct. 976, 36 L.Ed. 798 (1891).

Defendants contend that the disputed lands have formed through accretion to the previous eastern shore of the River. Accretions to riparian land are added to the title ownership of the landowner. *Arkansas v. Tennessee*, *supra*. Defendants are successors in interest to the allegedly accreted lands in this case.

The disputed area has been cleared and farmed since some time in the 1940's. Defendants Harold Jackson and

¹ The Omaha Tribe, exercising a prerogative under the treaty, selected the actual situs of the reservation in lieu of the description found in the treaty. See *Omaha Tribe v. United States*, 4 Ind. Cl. Comm. 627 (1957).

² This area became a part of Iowa when the States of Iowa and Nebraska agreed to fix their boundary line through the Boundary Compact of 1943. See *Nebraska v. Iowa*, 406 U.S. 117, 120 n. 4, 92 S.Ct. 1879, 31 L.Ed.2d 733 (1972).

Otis Peterson have leased the contested premises for the current crop year from Roy T. Wilson and Raymond G. Peterson, respectively. During April of this year, members of the Omaha Tribe, acting under authority of the Tribal Council, have entered upon the lands and posted signs declaring the area to be part of the Omaha Reservation. Bureau of Indian Affairs (BIA) officials assisted them in delimiting the boundaries.

Harold Jackson and Otis Peterson instituted an equity action on April 23 in Iowa District Court for Monona County³ seeking to enjoin members of the Tribe from entering upon the contested real estate. On May 16,⁴ following an amendment to the petition, the Iowa District Court issued a temporary writ of injunction restraining all members of the Tribe from entering upon said lands or interfering with the farming thereof by the plaintiffs in that case.

The United States in No. C 75-4024 seeks to quiet title to all lands in the Blackbird Bend area which allegedly remain a part of the Omaha Indian Reservation. The United States also prays for preliminary and permanent injunctions restraining defendants from prosecuting Equity No. 18965 in the State court, from attempting to enforce the aforementioned orders of the State court, and from interfering with the possession, use, or occupancy of the lands in question by the Tribe.

In No. C 75-4026, the Omaha Tribe eschews a quiet title action, asserting that the institution of such an action by the United States is an ineffectual way for the Government to protect its ownership rights as trustee in the contested lands. Preliminary and permanent injunc-

³ Equity No. 18965, District Court of the State of Iowa in and for Monona County.

⁴ On May 15, the court issued an order enjoining only certain named members of the Tribe from entering upon the disputed area.

tions similar to those in No. C 75-4024 are sought by the Tribe, and the applications for preliminary injunction in both cases are therefore being considered simultaneously in this ruling. Defendants in each action seek a preliminary injunction enjoining all persons other than the defendants from interfering with possession of the contested lands by the defendants.

The granting of a preliminary injunction rests within the sound discretion of the court, with the burden on the applicant to show a substantial probability of success on the merits and irreparable injury absent issuance of an injunction. The two other factors to be considered are the likelihood of harm resulting to other parties to the proceedings, and the nature of any public interest to be served by granting the injunction. *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973); *Allison v. Froehlke*, 470 F.2d 1123, 1126 (5th Cir. 1972); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F.Supp. 602, 603-604 (D. Minn. 1972).

Considering these factors as applied to this case, it is the court's view that plaintiffs are entitled to some form of a preliminary injunction.

It is undisputed that the Blackbird Bend area was previously within the Reservation boundary. The staff of the BIA has concluded, and the Solicitor of the Interior Department concurred in the conclusion, that approximately 3,190 acres in the Blackbird Bend region were still owned by the United States as part of the Reservation. Other than conclusory statements, defendants have produced no evidence to the contrary at this time.

The irreparable injury to be incurred here is the total loss of a growing season if one party or the other is not promptly prohibited from interfering with the other's attempts to farm the land. At present the apprehensiveness on both sides has prevented all but 160 acres of corn from being planted in the area.

The probability of financial injury to the defendants, tenants and purported landowners of the area in question, is substantial, but will be reduced by the court's form of injunction as set out below, which will require the net profits from this year's farming operation to be deposited with the Clerk of Court pending final determination of the quiet title action.

Finally, the public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty. Congress has expressed its desire to protect the interests of Indians in real property by prohibiting conveyance of such lands without the consent of the government. 25 USC § 177; *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). A preliminary injunction is an appropriate provisional remedy when special federally protected rights of Indians are threatened. *Organized Village of Kake v. Egan*, 80 S.Ct. 33, 4 L.Ed.2d 34 (1959) (Brennan, J., acting in capacity of circuit justice).

Defendants argue that a preliminary injunction is intended to maintain the status quo, 7 *Moore's Federal Practice* § 65.04[1], and the status quo is defined as the last uncontested status which preceded the pending controversy. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-809 (9th Cir. 1963); *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958). It is asserted by defendants that their possession in previous years was the last peaceable and uncontested occupancy, and that granting plaintiffs a preliminary injunction essentially awards them relief to which they would only be entitled upon a favorable determination on the merits.

The court cannot agree. The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land, and the Monona County Assessor apparently felt unsure enough of the status of title to

omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course. But most significantly, the court views the present occupation by the Omaha Tribe, with the approval of the Tribal Council acting pursuant to its authority under 25 USC § 476, and with the assistance of the BIA acting in its capacity as an executive agency, constitutes the status quo to be preserved. Designees of the Tribal Council have planted 160 acres and tilled another 500 acres, the only farm work done this spring in the area.

Since the United States is here seeking an injunction to prevent threatened irreparable injury to a federally protected interest, to wit, possession of and title to lands originally owned by the United States in trust for the Omaha Indians, the prohibition against enjoining state court proceedings in 28 USC § 2283 is not applicable here. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957); *United States v. Akin*, 504 F.2d 115 (10th Cir. 1974) (United States suing as trustee of water rights held on behalf of Indian tribes).

The State of Iowa entered a special appearance in this matter to contest jurisdiction because of improper service. Though subsequently served, the State argues that the delayed notice has prevented it from preparing detailed exhibits and arguments. The State asks that the land to which it claims an interest, and which is not under cultivation, be exempted from any injunctive decree. No accurate legal description of this property having been submitted, the court is unable to specifically position or exempt this parcel, but will entertain a motion for relief from the decree should the State deem it necessary.

It is therefore

ORDERED

1. Defendants' applications for preliminary injunction denied.

2. Plaintiffs' applications for preliminary injunction granted.

3. Each and every defendant, his agents, employees, and successors in interest, is hereby enjoined and restrained from interfering with the use and occupancy of the lands hereinafter described by the Omaha Tribe and its individual members, agents, employees or designees, and from prosecuting or attempting to prosecute that action heretofore filed in the District Court of Iowa in and for Monona County, entitled *Jackson, et al. v. Cline, et al.*, Equity No. 18965, and from attempting to enforce any orders in said state court action directing any individual member of the tribe to vacate any portion of the lands hereinafter described, or any such orders permitting any of the defendants herein to occupy any portion of said lands, until such time as this case may be heard and final judgment entered. This order shall apply to all lands described as follows, and which are east of the 1943 Iowa Nebraska compact line and which have not been allotted to individual members of the Omaha Tribe and thereafter sold to nonmembers.

* * * *

4. Plaintiff Omaha Indian Tribe shall deposit with the Clerk of Court the net profits received for all crops harvested from the aforesaid lands during the calendar year 1975, together with a report of receipts and disbursements.

June 5, 1975.

/s/ Edward J. McManus
EDWARD J. MCMANUS
Chief Judge
United States District Court

APPENDIX IV
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ROY TIBBALS WILSON, et al.,
Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,
vs.

HAROLD JACKSON, et al.,
Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, etc.,
Plaintiff,
vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT
COMPANY, et al.,
Defendants.

ORDER

This matter is before the court on the following motions:

* * *

Also ripe for decision are rulings previously reserved¹ concerning motions for payment of winter wheat crop

¹ Order of December 15, 1975, in Nos. C 75-4024 and C 75-4026.

expenses and for allocation of certain corn harvest proceeds and expenses.

Motions to Dismiss

Numerous defendants in No. C 75-4067 move to dismiss on the ground that no claim is stated because it appears upon the face of the complaint that all claims alleged are barred by the pertinent Iowa statute of limitations, § 614.1(5), Code of Iowa (1975). It is the court's view that the motion is not well taken.

Even assuming Iowa law to be applicable on this issue, the Iowa high court has consistently held that the doctrine of adverse possession as governed by the statute does not affect a change of title against governmental bodies so as to prevent the exercise of their governmental functions. *E.g.*, *Twining v. City of Burlington*, 68 Iowa 284, 27 N.W. 243 (1886); *Johnson v. City of Shenandoah*, 153 Iowa 493, 133 N.W. 761 (1911); *Sioux City v. Betz*, 232 Iowa 84, 4 N.W.2d 872 (1942). Here the United States is a named party in one action and has a governmental interest in protecting the title of all lands held in trust for an Indian tribe pursuant to treaty. *See Heckman v. United States*, 224 U.S. 413, 437-438, 32 S.Ct. 424, 56 L.Ed. 820 (1912).

Furthermore, plenary control over tribal rights to Indian lands became the exclusive province of Federal law upon adoption of the Constitution. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). The primacy of Federal law has been asserted through the Non-intercourse Act of 1790, 1 Stat. 137, and its successors, now codified at 25 USC § 177.

The latter statute provides *inter alia*:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any

Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

If title to tribal lands is not alienable by the Indians, a *fortiori* title cannot be obtained against them by adverse possession. *United States v. Schwarz*, 460 F.2d 1365, 1371-1372 (7th Cir. 1972); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422-423 (4th Cir. 1938).

* * *

Motion for Partial Summary Judgment

Plaintiff Tribe moves for summary judgment on several issues raised by way of affirmative defenses in the answers of certain defendants. Summary judgment is appropriate only where no genuine issues of material fact remain unresolved and the movant is clearly entitled to judgment as a matter of law. Rule 56, FRCP; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *Chicago & Northwestern Ry. Co. v. Hospers Packing Co., Inc.*, 363 F.Supp. 697 (N.D. Ia. 1973). Here defendants have failed to file any resistance generating factual issues as required by Rule 56(e), FRCP, and it appears that the issues remaining on these defenses are largely questions of law.

The court has previously indicated that it has subject matter jurisdiction over these actions, 28 USC §§ 1331, 1345, 1362, and plaintiffs' motion is granted on this issue. It is also the court's view that the complaints do state a cause of action, and the motion will also be granted on this issue.

With respect to those issues listed in subparagraphs c-h, summary judgment is appropriate as a matter of law only with respect to the establishment of title aspects and not on the damages issues. As stated above, state

statutes of limitations cannot effect adverse possession of lands held in trust by the United States for the benefit of Indian tribes. Similarly, state rules of laches, estoppel, or abandonment have no applicability to the title dispute in the instant action. *United States v. Schwarz, supra* at 1372. Summary judgment will be granted to the extent indicated above, and denied in all remaining respects.

* * *

It is therefore

ORDERED

* * *

9. Motion for partial summary judgment granted on those issues indicated in text and denied in remaining respects.

* * *

April 5, 1976.

/s/ Edward J. McManus
EDWARD J. MCMANUS
Chief Judge
United States District Court

Nos. 78-160, 78-161 and 78-162

Supreme Court, U. S.

FILED

OCT 18 1978

MICHAEL ROOPE, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY TIBBALS WILSON, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

STATE OF IOWA, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

RGP, INC., ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

No. 78-161

STATE OF IOWA, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

No. 78-162

RGP, INC., ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A67) is reported at 575 F.2d 620. The opinions of the district court (Pet. App. B1-B61, Pet. App. C1-C21) are reported at 433 F. Supp. 67 and 57.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1978. A petition for rehearing was denied on May 2, 1978. The petitions for a writ of certiorari were filed on July 28, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

25 U.S.C. 194 provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether 25 U.S.C. 194, which in terms applies to property actions between "an Indian" and "a white person," is applicable to the instant action brought by an Indian tribe and by the United States as trustee against individuals, corporations, and the State of Iowa.

2. Whether 25 U.S.C. 194 creates a racial classification that violates the Due Process Clause of the Fifth Amendment.

3. Whether the court of appeals erred in applying federal common law rather than state law to determine the river boundary of an Indian reservation that coincided with the border between two states (Nos. 78-160 and 78-161).

4. Whether the court of appeals erred in holding that an avulsion may occur when there is a sudden change of the thalweg of a river (No. 78-160).

STATEMENT

These consolidated actions were brought by the Omaha Indian Tribe and the United States as trustee for the Tribe to quiet title to approximately 2,900 acres of land bordering on the Missouri River.¹ In 1854, the United States entered into a treaty with the Omaha Tribe of Indians (Pet. App. A2 & n.1).² Pursuant to the treaty a reservation was established on land riparian to the Missouri River, within the present State of Nebraska. The boundary of the reservation was the center of the main channel of the Missouri River (*id.* at A6 & n.5). The reserva-

¹ The Tribe filed two actions which included a claim for a total of approximately 11,000 acres. When the Tribe's actions were consolidated with the government's action claiming 2,900 acres of the same land on behalf of the Tribe, the Tribe's claim for approximately 8,000 additional acres was severed for later consideration (Pet. App. B3, B5).

² The treaty is reprinted at 10 Stat. 1043.

tion was officially surveyed in 1867 by T. H. Barrett of the General Land Office of the United States (*id.* at A5), and the survey map showed that the reservation included a substantial peninsula jutting east toward the Iowa side of the river (see Plate I, Pet. App. A10). That peninsula is referred to as the Blackbird Bend area.

Between 1867 and 1923, the river changed its course a number of times, sometimes moving eastward and sometimes to the west (Pet. App. A7-A9). Since at least 1927 the river has been west of its 1867 position, and much of the Blackbird Bend area has been on the Iowa side of the river, separated from the remainder of the reservation. As this tract gradually dried out, settlers arrived and began to farm the land. Petitioners, who are settlers or successors in title to settlers, farmed much of the land until 1975, when the Tribe took possession (*id.* at A4).³

Applying Nebraska law, the district court concluded (Pet. App. B49-B50) that the Blackbird Bend peninsula shown in the Barrett survey was washed away by gradual erosion, and new land was added to the Iowa shore by accretion. Accordingly, judgment was entered for petitioners quieting title in them (Pet. App. D1-D3).

The court of appeals reversed, finding that the trial court's ruling was marred by three fundamental legal

³ The district court granted a preliminary injunction permitting the Tribe's continued occupancy during the pendency of this litigation, but requiring accounting of the profits (*ibid.*).

errors (Pet. App. A1-A67). First, the court held (*id.* at A13-A20) that the district court had erred in applying Nebraska law, rather than federal law, in evaluating the facts of the case. It concluded (*id.* at A13-A15) that federal law controlled because the boundary of the reservation at the time of the changes in the course of the river was coextensive with the interstate boundary. Moreover, the court pointed out that the Tribe asserted a right to Indian trust land arising under and protected by federal law (*id.* at A15-A20). Second, the court concluded (*id.* at A20-A25) that the district court had improperly put the burden of proof on the Tribe. Congress' longstanding protectionist policy with regard to Indians is expressed in 25 U.S.C. 194, which places the burden of proof on a party seeking to divest an Indian of title to land. Since the Tribe had proved that the Blackbird Bend area, as depicted by the Barrett survey, was originally within the reservation, petitioners had the burden of proving that the Tribe no longer held title. Third, the court concluded that the district court had based its ruling upon too narrow a definition of avulsion, erroneously "focus[ing] on identifiable land in place as the sole criterion of avulsion * * *" (*id.* at A27).

Turning to the district court's findings of fact, the court of appeals concluded, after a detailed review of the testimony and exhibits (*id.* at A65; footnote omitted):

considered in the context of the broader parameters of avulsion we hold that [petitioners']

case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194.

ARGUMENT

1. The principal contention of all petitioners is that 25 U.S.C. 194 violates the Due Process Clause because it creates an invidious racial classification (No. 78-160 Pet. 11-18; No. 78-161 Pet. 10-11; No. 78-162 Pet. 6-15). In our view, the court of appeals correctly upheld the validity of the statute, and in any event the constitutional question is not, at least at the present time, ripe for review by this Court.

a. As this Court stated in *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974), the resolution of petitioners' Due Process claim must turn "on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." The Court there concluded that Congress' judgment in adopting "legislation that singles out Indians for particular and special treatment" will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 554-555. In *United States v. Antelope*, 430 U.S. 641, 645

(1977) (footnote omitted), the Court reaffirmed this analysis, holding that—

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the government's special obligation toward its Indian wards by protecting their most valuable property, their lands. In order to safeguard this vital Tribal resource against questionable claims, Section 194 provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

b. In any event, the instant case is not an appropriate vehicle for consideration of the constitutional issue petitioners raise. There is no conflict among the circuits. Indeed, as petitioners acknowledge (No. 78-160 Pet. 11; No. 78-162 Pet. 7 n.8), this is a question of first impression, since no recorded decision prior to the instant case has considered the constitutionality or the construction of Section 194. Moreover, even in the instant case, the question has received little attention. The district court, which

found Section 194 inapplicable, did not consider the constitutional question, and the court of appeals discussed the question in a footnote (Pet. App. A20 n.18). And, although all petitioners rely heavily (No. 78-160 Pet. 12-13, 15-16; No. 78-161 Pet. 11; No. 78-162 Pet. 7, 10, 14) on this Court's decision in *University of California Regents v. Bakke*, No. 76-811 (June 28, 1978), no lower court has considered the constitutionality of Section 194 in light of the *Bakke* decision.

Accordingly, although petitioners and amicus American Land Title Association urge (No. 78-160 Pet. 12; No. 78-161 Pet. 8; No. 78-162 Pet. 6-7; American Land Title Association Br. 2-5) the Court to review this case on the ground that the decision upholding Section 194 may affect a large number of pending and potential actions, we believe that it would be inadvisable for the Court to consider the constitutionality of the statute without the benefit of the views of the lower courts, and without the experience gained from the application of the statute in a variety of factual contexts.

Moreover, although the court of appeals relied upon Section 194 in reversing the district court, the decision below may be independently correct without reference to the presumption announced in that section. As noted above, the court of appeals concluded that the district court had erred not only in placing the burden of proof on the Tribe, but also in applying state rather than federal law, and in defining the concept of avulsion too narrowly. And, in evaluating

the district court's findings regarding the nature of the river's movements during the two critical periods, the appellate court found the evidence supporting petitioners' theory of a gradual accretion insubstantial. The court of appeals found the trial court's conclusion about the river's movement between the first critical period, between 1879 and 1912, "clearly erroneous and not supported by substantial evidence" (Pet. App. A40). And with regard to the second critical period, between 1912 and 1923, the court found (*id.* at A64) that "[t]he little solid scientific evidence in the record contradicts the defendants' theory of how the river moved."⁴

2. Petitioners also contend (No. 78-160 Pet. 18-23; No. 78-161 Pet. 6-8; No. 78-162 Pet. 11) that Section 194 is, by its own terms, inapplicable to the

⁴ Finding that "in the present case the entire opinion of the trial court relating to the evidence and findings of fact is essentially a memorandum written by [petitioners]," the court of appeals repeated (*id.* at A23-A24 n.21) this Court's admonition in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964) (emphasis added by the court of appeals):

Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. * * * Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court. * * * Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States v. Forness*, 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case.

instant case, because this is not an action between a single Indian and a single white person.

a. The court below did not discuss these contentions (which petitioners made in passing, but did not develop), and the issues of statutory construction are ones of first impression. For reasons similar to those discussed above, we believe the Court should not attempt to resolve the several questions raised regarding the construction of the statute without the benefit of any consideration of these issues by the lower courts.

b. In any event, there is no basis for petitioners' restrictive interpretation of Section 194. The court of appeals' construction of Section 194 effectuates the protective policy of the statute and is consistent with the cardinal principle that statutes enacted for the protection of Indians should be "liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

The purpose of Section 194—to assure that Indians are not deprived of their lands unless non-Indians can affirmatively prove their claims—is equally applicable when the United States brings suit as trustee for the Indians, or when the tribe, rather than an individual Indian, is a party. Indeed, construing the statute as inapplicable to suits brought by an Indian tribe would make the statute inapplicable to protect most trust lands, since as a general matter "[w]hat-ever title the Indians have is in the tribe, and not in

the individuals, although held by the tribe for the common use and equal benefit of all the members.'" *United States v. Jim*, 409 U.S. 80, 82 (1972), quoting *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902).

There is no merit to petitioners' suggestion (No. 78-160 Pet. 18-19; No. 78-161 Pet. 7) that the language in Section 194 was chosen with the intent of making Section 194 inapplicable to actions brought by Indian tribes. So far as the legislative history reveals, the use of the singular "an Indian" was substituted for the plural term "Indians," which had been used in the introductory portion of the predecessor to Section 194 (Section 4 of the Act of May 6, 1822, 3 Stat. 683), only to make the syntax of Section 194 consistent. The predecessor provision had shifted uncomfortably between plural and singular terms. It provided (emphasis added):

And be it further enacted, That, in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

There is no evidence that the change to the use of singular terms throughout Section 194 was intended to make the statute inapplicable to suits brought by a tribe.

Petitioners also argue (No. 78-160 Pet. 19-21; No. 78-161 Pet. 6-7; No. 78-162 Pet. 11-12) that the court of appeals erred in assuming that Section 194 applies to any action between an Indian and a non-Indian, including corporations, states, or non-Caucasians. This contention is equally without merit. Petitioners place primary reliance on this Court's decision in *United States v. Perryman*, 100 U.S. 235 (1879), which held that the term "white person" as used in a related provision did not include a black person. Although the provision interpreted in *Perryman*, Section 16 of the Act of June 30, 1834, 4 Stat. 731, was part of the same enactment that included Section 194, Section 16 had a far different legislative history. As this Court concluded in *Perryman*, the words "a white person" were substituted in Section 16 in place of the broader language used in an earlier enactment with the intent of excluding from the coverage of Section 16 fugitive black slaves who might seek refuge among tribes such as the Cherokees. 100 U.S. at 238. Since there was no analogous change made in the language of Section 194, *Perryman* provides no support for petitioners' argument. Whereas the narrow use of the term "white person" in *Perryman* served a specific legislative purpose, the narrow interpretation petitioners seek to place on Section 194 would completely undermine Congress' protective policy. The protection of Section 194 could be avoided by Caucasian individuals through the simple expedient of forming a corporation, and no protection of any kind would exist against claims of any non-"whites." Construing Section 194 as applicable to

actions between Indians and non-Indians is far more consistent with Congress' protective policies.⁵

3. Petitioners next contend (No. 78-160 Pet. 23-24; No. 78-161 Pet. 11-12) that the court of appeals erred in applying federal, rather than state, principles of accretion and avulsion. Iowa and the amici States urge that the application of state law violates the established principle that state law governs real property disputes, including questions of title to riparian lands along navigable rivers within the states (No. 77-161 Pet. 11).

As the court of appeals concluded, there are two independent grounds for rejecting this contention: federal law governs, first, because an interstate boundary is involved, and, second, because the Tribe is asserting a federally created and protected right

⁵ Contrary to Iowa's argument (No. 77-161 Pet. 7) that "[r]eading person to include states violates the plain meaning of the words used, both in the sense of their common usage and as interpreted by the Court in other contexts," this Court has on numerous occasions construed the statutory term "person" as including states. See, e.g., *Hawaii v. Standard Oil Company*, 405 U.S. 251, 261 (1972) (Section 4 of the Clayton Act, 15 U.S.C. 15); *Sims v. United States*, 359 U.S. 108, 112 (1959) (Section 6332 of the Internal Revenue Code of 1954, 26 U.S.C. 6332); *Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (26 U.S.C. (1928 ed.) 205). Cf. *Pfizer Inc. v. India*, 434 U.S. 308, 311-313 (1978) (foreign nation a "person" under Section 4 of the Clayton Act); *Monell v. Department of Social Services*, No. 75-1914 (June 6, 1978) (local government units "persons" under 42 U.S.C. 1983). Petitioners' reliance (No. 77-161 Pet. 7) on *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), is misplaced, since that case holds only that the states have never been considered to be "person[s]" within the meaning of the Due Process Clause of the Fifth Amendment.

that state law cannot unilaterally extinguish (Pet. App. A13-A20).

As this Court held in *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977), if a navigable stream forms the boundary between two states, federal common law governs "the effect of a change in the bed of the stream on the boundary." Although the boundary between Iowa and Nebraska is now set by an interstate compact independent of the river,⁶ the court of appeals correctly held that the principle noted in *Corvallis* justified the application of federal law in the instant case, because the river did form the boundary between Iowa and Nebraska (as well as the boundary of the reservation) at the time of the disputed changes (Pet. App. A14-A15). Since the boundary of the reservation was coextensive with the interstate boundary at the time in question, the location of that boundary was governed by federal law.⁷

Further, as the court of appeals noted (Pet. App. A15-A19), there is a second and independent basis for the application of federal law. The Tribe's claim, like that asserted by the Oneidas in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677 (1974),

⁶ Iowa-Nebraska Boundary Compact, ratified by the Act of July 12, 1943, 57 Stat. 494.

⁷ Moreover, as the court of appeals pointed out (Pet. App. A15 & n.12), the location of the interstate boundary prior to the adoption of the compact is not a matter of merely academic interest, since the compact requires both states to recognize pre-1943 titles good in the state where the land was then located.

does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

To apply state law in the instant case would, in effect, permit the state unilaterally to abrogate rights created by treaty and continuously protected by the United States. Although state law may properly determine the incidents of rights which attach to the ownership of property held in trust for the Tribe by the United States, state law may not extinguish title to tribal reservation lands.⁸

⁸ The amici States of Indiana, Alaska, et al., seek to distinguish *Oneida Indian Nation* on the ground that there was no dispute there that Indian land was involved, whereas that is precisely the question here (Br. 13-14). To the contrary, however, the Tribe established that the area in question was Indian land within its reservation at the time of the Barrett survey in 1867. The question in the instant case, like that in *Oneida Indian Nation*, *supra*, is whether the Tribe's rights were extinguished by subsequent events. In both cases, the question whether the tribe's federal title was extinguished was governed by federal law. The court of appeals' reasoning is fully consistent with *State Land Board v. Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 377, where the Court quoted with approval the following passage from *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839) (emphasis by the Court in *Corvallis*):

We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether*

Accordingly, the court of appeals' determination that federal common law governed the instant case is correct, and follows the prior decisions of this Court.*

4. Finally, petitioners urge (No. 78-160 Pet. 23-29) that the court of appeals was mistaken in defining federal principles of accretion and avulsion. They argue that the court erred in ruling that an avulsive change can occur when the thalweg, or channel of the river, changes location within the bed of a river, and in ruling that an avulsive change can occur even if no identifiable land remains in place when the channel changes course.

The court of appeals correctly ruled (Pet. App. A34) that the essential aspect of avulsion is "the sudden, perceptible change of the channel, whether within or without the river's original bed." The court recognized that whether the river's change leaves an identifiable land mass in place is a factor to be considered in determining whether a change in the river is due to accretion or avulsion, but it concluded that a change may be avulsive even though "intervening

a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation* * * *.

* In any event, the precise question presented here—what law governs a dispute involving a reservation boundary once coextensive with an interstate boundary—is a narrow one, and we question whether the issue is of sufficient general importance to warrant review by this Court.

land may not be visible at the time a sudden flood or freshet occurs" (*id.* at A34-A35). On this point the court followed its earlier decision in *Uhlhorn v. United States Gypsum Co.*, 366 F.2d 211, 219-220 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967), where it found that an avulsive change had occurred although the sandbar separating the old and new channels was as much as four feet under water when the change occurred. Accord: *Nolte v. Sturgeon*, 376 P.2d 616, 620-621 (Okla. 1962).

The court's ruling is not inconsistent with the prior decisions of this Court. Although, as petitioners point out, this Court approved the Special Master's report in *Louisiana v. Mississippi*, 384 U.S. 24 (1966), the master based his conclusions that the changes in the Mississippi River had resulted from accretion not only on his ruling (quoted at No. 78-160 Pet. 26) that a change in the channel within the bed of a river does not constitute an avulsion, but also upon his finding that the channel had moved gradually, not suddenly (Special Master's Report, No. 14 Original, 1962 Term at 20). This Court's per curiam affirmance, without discussion, did not establish the correctness of the master's conclusion that no avulsion could have occurred even if the change in the channel had been sudden.

Petitioners' reliance on *Nebraska v. Iowa*, 143 U.S. 359 (1892), is also misplaced. In that case the Court considered the question whether the traditional concepts of accretion and avulsion could be applied to the Missouri River, where the force of the river

caused the normal processes of gradual erosion to operate so rapidly that "it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible." 143 U.S. at 369. The Court concluded that even the relatively rapid erosion of the soil of the banks during the periodic rises in the current was accretion, not avulsion. 143 U.S. at 369-370. It did not hold that avulsion may not take place where, as here, the channel shifts suddenly within the bank, even if the identifiable land left in place is not above the high water mark. In the latter circumstance, the rationale this Court has identified for the doctrine of avulsion—"a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners"—is fully applicable. See *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 327 (1973), overruled on other grounds, *State Land Board v. Corvallis Sand & Gravel Co.*, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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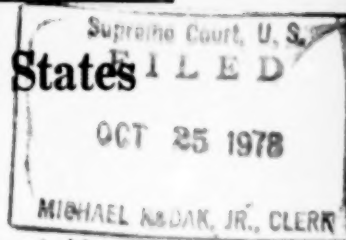
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OCTOBER 1978

In The
Supreme Court of the United States
October Term, 1978

Nos. 78-160, 161 and 162



Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
Harold Jackson, Darrell L., Harold, Harold M. and Luea
Sorenson, and R. G. P. Incorporated, Otis Peterson,
Travelers Insurance Company, State of Iowa and
State Conservation Commission of the State of Iowa,
Petitioners,

vs.

Omaha Indian Tribe and United States of America,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF OF PETITIONERS IN REPLY TO BRIEFS FOR
THE UNITED STATES AND THE OMAHA INDIAN
TRIBE IN OPPOSITION TO PETITION FOR
CERTIORARI**

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In The
Supreme Court of the United States

October Term, 1978

Nos. 78-160, 161 and 162

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
 Harold Jackson, Darrell L., Harold, Harold M. and Luea
 Sorenson, and R. G. P. Incorporated, Otis Peterson,
 Travelers Insurance Company, State of Iowa and
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Omaha Indian Tribe and United States of America,
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On Petition for a Writ of Certiorari to the United States
 Court of Appeals for the Eighth Circuit

**BRIEF OF PETITIONERS IN REPLY TO BRIEFS FOR
 THE UNITED STATES AND THE OMAHA INDIAN
 TRIBE IN OPPOSITION TO PETITION FOR
 CERTIORARI**

A. REPLY TO BRIEF OF THE UNITED STATES

This case is an appropriate vehicle for the
 determination of the questions of the constitu-
 tionality, interpretation and applicability of 25
 U. S. Code § 194, which are indeed ripe for review.

The only point in the brief of the United States in
 opposition to the Petitions for Certiorari which appears
 to call for a reply, is the argument that the questions of
 the constitutionality and of the interpretation and appli-
 cability of Section 194 are not now ripe for review—
 that the instant case is not an appropriate vehicle for
 their consideration by this court, because (1) there is no
 conflict between the Circuits since this is a case of first
 impression, there being no recorded decision prior to the

instant case which has considered the constitutionality or the construction of Section 194, (2) in the instant case, the questions received little attention, and (3) no lower Court has considered the constitutionality of Section 194 in the light of the *Bakke* decision.

We submit that the foregoing arguments would provide no justification for a refusal by this Court to consider this case. On the questions of constitutionality and construction of Section 194, the issues are simple and clear. Do the words "an Indian" in Section 194 mean an incorporated Indian tribe? Do the words "a white person" mean all non-Indians including individuals whose race and color are not shown in the record, a private corporation and a sovereign state? Does a statute which takes their property from non-Indians and awards it to an Indian tribe solely because of race, deprive those non-Indians of their property without due process in violation of the due process clause of the 5th Amendment? These questions require no additional lower Court decisions to present them squarely to this Court.

Nor does the fact that in the Court of Appeals' opinion these questions received little attention provide an argument against granting certiorari. Should such a Court of Appeals' opinion be less subject to review by this Court than one which thoroughly considers all of the arguments? Need this Court await the decisions of two Circuits to tell it what its *Bakke* decision means as applied to Section 194?

We submit that the questions of the interpretation and constitutionality of Section 194 are, indeed, ripe for determination by this Court. These questions are of great

importance to the petitioners who invested millions of dollars in the land involved before any claim to it was ever asserted by the Omaha Tribe or by the United States. These questions are of great importance to Gordon Dahl and the 81 other farm owners in Monona County whose lands are claimed by the Omaha Tribe in the part of Case No. C 75-4067 which has not yet been tried. Their tracts claimed by the Tribe average 186 acres in size, a total of 6500 acres, valued at thirteen million dollars. These questions are of great importance to the 30 States which filed Briefs *Amicus Curiae* in support of the petition of the State of Iowa for certiorari. These questions are of great importance to the 2200 members—land title insurers, their agents, and associate members—of the American Land Title Association, as shown by the brief *amicus* of that association. In other words, these questions are of great public importance.

Rule 19 of the Rules of this Court calls for no such delay. It says:

1. A review on writ of certiorari . . . will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . .

As to the conflict with applicable decisions of this Court, we note that the brief of the United States (page

17), concedes that the holding of the Court of Appeals conflicts with the holding by the Special Master of this Court "in all things confirmed" by this Court in *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), that a change in the channel within the bed of a river does not constitute an avulsion. See page 26 of the Petition for Certiorari, No. 78-160. And, clearly, the questions of the interpretation and constitutionality of Section 194 are important questions of Federal law which have not been but should be settled by this Court.

B. REPLY TO BRIEF OF OMAHA INDIAN TRIBE

The questions of the constitutionality and applicability of 25 U. S. Code § 194 are crucial to the Court of Appeals' decision in this case.

In his Brief for the Omaha Indian Tribe in Opposition to the Petitions for Certiorari, counsel for the Tribe, having previously urged the District Court and the Court of Appeals to apply 25 U. S. Code § 194, now argues that this Court need not reach the questions of the applicability and the constitutionality of § 194. He asserts that by pleading that after Barrett made his survey in 1867, the Barrett survey area was eroded away and washed down the river and that the land presently occupying that area under the sky is accretion to the Iowa riparian land, Petitioners voluntarily assumed the burden of proof (risk of non-persuasion) and were, therefore, not affected by the Court of Appeals' application of § 194.

But, as applied by the Court of Appeals, § 194 did not merely place a burden of proof on Petitioners. It relieved the Tribe and the United States of any burden of proof in this quiet title action in which they are the plaintiffs.

The trial court (Opinion, App. C. 17, 18) said:

... generally a claimant, whether a Plaintiff or a counterclaiming Defendant, has the burden of persuasion in a quiet title action as to the strength of his or her own title. (Citing 65 Am. Jur. 2d 207-208, Quieting Title § 78 (1972).)

So the trial court put the burden of proof on the plaintiffs on their complaints and on the defendants on their counterclaims. And, in the absence of § 194, that is the way it would be, subject to the application of certain presumptions or inferences we refer to later.

Nowhere does the Court of Appeals claim that the Tribe or the United States sustained the burden of proof they would have in the absence of § 194. On the contrary, it held that since it was shown that the Tribe or the United States, as trustee for the Tribe or for its members, owned land or river bed in the Barrett survey area in 1867, that was all that was required to make a case for them—§ 194 did the rest. The Court of Appeals said:

... the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines. This historical fact shows "previous possession or ownership" and is sufficient to raise a presumption of title in the Tribe under the statute [§ 194] and to place the burden of proof on the defendants. (App. A21, 22).

Other than by that presumption, the Court of Appeals did not claim that the Tribe or the United States had proved the occurrence of any avulsion or avulsions. It said:

Although it is possible that the land represented by bar C may have completely eroded, . . . the record is insufficient to prove what actually occurred. (App. A44).

None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstances shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion. (App. A49).

We conclude on the basis of an overall review of the record that it is entirely speculative to determine when or how the thalweg moved to the position shown on the 1923 map. (App. A65).

These established facts do not prove that either accretion or avulsion caused the river's movement. (App. A62).

So, adhering to its dependence on § 194 for its decision, the Court of Appeals, coming to the conclusion of its opinion said:

We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194 (App. A62). Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194. (App. A65).

How different is the situation with § 194 eliminated! The burden of persuasion would be upon the Omaha Tribe to prove its title and upon the defendants to prove theirs. But favoring defendants are a number of presumptions which are briefly listed on Page 22 of the Petition for

Certiorari, No. 78-160. These include the strong presumption in favor of accretion as against avulsion.¹

That has been characterized by the courts as a strong presumption,² founded on long experience and observation that accretion is usual and avulsion is exceptional. But, it is really more than a presumption, and has become the rule of the live thalweg, requiring clear and convincing evidence of a cutoff to satisfy the burden of persua-

¹ The trial judge, Honorable Andrew W. Bogue, found that Nebraska law applied and that under Nebraska law defendants would not have the benefit of the presumption in favor of accretion as against avulsion which would be applicable if federal or Iowa law were applied (App. C15, 16). However, the cases cited by Judge Bogue are not accretion versus avulsion cases. They involved questions of to whose land would accretion attach, and of adverse possession, and the presumption of accretion versus avulsion was not raised. We see no reason why Nebraska law would not apply that presumption in an avulsion versus accretion case. Except for that presumption and ownership of the bed of the river to the thalweg in Iowa by the State and in Nebraska by the riparian owners, Judge Bogue noted that he had "researched both federal and Iowa law of accretion and avulsion and found that, as to definitions of those terms with respect to the Missouri River, there are no significant differences among federal, Iowa and Nebraska laws which are relevant to this case." (App. C17).

² Under Nebraska law, Sec. 27-301 R. R. S. Nebr. 1943, the "presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

Under Iowa law, the "nonexistence of the presumed fact must be conclusively established before presumption can be eliminated." *Beggs v. Metropolitan Life Insurance Company*, 219 Iowa 24, 257 N. W. 445, 95 A. L. R. 863 (1934); *Johnson v. Marshall*, 232 Iowa 299, 4 N. W. 2d 369 (1942).

Under federal law, if Rule of Evidence No. 301 limits its effect as a presumption, the strong inference from the factual basis for the presumption of accretion remains as circumstantial evidence of accretion. 29 Am. Jur. 2d 203, Evidence § 165.

sion of one claiming an avulsion. (See, Footnote 2, p. 10 and pp. 26 and 27 of Petition for Certiorari, No. 78-160.)

In the absence of § 194, with each party having the burden of proving his own case, the court would have to decide which side had sustained its burden of proof giving due weight to presumptions, inferences and the evidence. This the trial court did. Because of § 194, the Court of Appeals did not.

If that could not be done and the Court were to say (as the Court of Appeals seems to say) that the evidence is all so speculative and conjectural that it cannot decide in favor of either side, then it would seem that the complaints and counterclaims of all parties would have to be dismissed and the Federal Court injunction³ against Peti-

³ The injunction reproduced as Appendix III to the brief of the Omaha Indian Tribe in Opposition to the Petitions for Certiorari was issued by Judge McManus on June 5, 1975. Before that, Clark, the surveyor employed by the B. I. A., and Robinson, the geologist employed by Clark, had spent months assembling maps and other materials, and had submitted to the B. I. A. elaborate reports in September of 1974, showing, as was shown at the trial, that all of the significant movements of the river in the Blackbird Bend area occurred prior to 1927, and before the commencement of any work by the U. S. Engineers (which did not start until 1936) in the area. Nevertheless, plaintiffs submitted to Judge McManus a memo signed by the Solicitor of the Department of the Interior, dated 2/3/75, stating:

. . . The Army Corps of Engineers undertook a program in the 1940s to rechannelize the Missouri River to reduce flooding and to stabilize the location of the river. The rechannelization had the effect of cutting the Blackbird Bend oxbow off from the rest of the reservation. The oxbow became part of the eastern bank of the Missouri River for the first time. Not only had it shifted to Iowa's jurisdiction under the 1943 Compact, but geophysically, it became contiguous with the eastern bank due to the cessation of flow around the oxbow.

(Continued on next page)

tioners and against the state court would have to be dissolved. That would restore jurisdiction to the Iowa State Court and reinstate its injunction against the Indians, who, with the connivance of certain employees in the Bureau of Indian Affairs, in April of 1975, invaded the Barrett survey area and wrested the occupancy of that land from the Petitioners.

Section 194 is indeed the crux of the Court of Appeals' decision.

Respectfully submitted,

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(Continued from previous page)

Based on that completely erroneous statement of fact, Judge McManus issued the injunction putting the Tribe in possession of the Barrett survey area pending trial. Note the second paragraph beginning on page 4a and the third paragraph beginning on page 6a of said Appendix III. After defendants had had time to employ an expert to make a study and a report, they attempted to obtain a hearing from Judge McManus on their application for a return of possession of the land pending trial, but their application was denied without hearing.

DEC 27 1978

MICHAEL RODAK, JR. CLERK

**In The
Supreme Court of the United States
October Term, 1978**

— 0 —
No. 78-160
— 0 —

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FLORENCE LAKIN, HAROLD JACKSON, DARRELL
L., HAROLD, HAROLD M. AND LUEA SORENSON,
Petitioners,

R. G. P. INCORPORATED, OTIS PETERSON, TRAV-
ELERS INSURANCE COMPANY, STATE OF IOWA
AND STATE CONSERVATION COMMISSION OF
THE STATE OF IOWA,

Respondents (Petitioners on separate petitions),

VS.

OMAHA INDIAN TRIBE AND
UNITED STATES OF AMERICA,

Respondents.

— 0 —
**On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit**
— 0 —

BRIEF OF ABOVE PETITIONERS
— 0 —

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93 C. J. S. 750, 751, <i>Waters</i> , Sec. 76	17
<i>Wright</i> , 14 <i>Federal Practice and Procedure</i> , 141 N. 4 (1976)	46

In The
Supreme Court of the United States

October Term, 1978

—o—
No. 78-160
—o—

ROY TIBBALS WILSON, CHARLES E. LAKIN,
FLORENCE LAKIN, HAROLD JACKSON, DARRELL
L., HAROLD, HAROLD M. AND LUEA SORENSON,
Petitioners,

R. G. P. INCORPORATED, OTIS PETERSON, TRAV-
ELERS INSURANCE COMPANY, STATE OF IOWA
AND STATE CONSERVATION COMMISSION OF
THE STATE OF IOWA,

Respondents (Petitioners on separate petitions),

vs.

OMAHA INDIAN TRIBE AND
UNITED STATES OF AMERICA,

Respondents.

—o—
**On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit**
—o—

BRIEF OF ABOVE PETITIONERS

—o—
OPINIONS BELOW

The opinion of the Court of Appeals, reported, *Omaha Indian Tribe v. Wilson*, 575 F. 2d 620, appears as Appendix A¹ to the Petition for Certiorari. The Findings of Fact and Conclusions of Law and the Memorandum Opin-

¹ With the petitions for certiorari petitioners filed a white covered volume containing Appendices A to F, inclusive, each separately page numbered. References to them will be made, e. g. (App. A17). References to the buff covered appendix filed herewith will be made, e. g. (A. 97).

ion of the District Court of the Northern District of Iowa are reported, *United States v. Wilson*, 433 F. Supp. 67 and 57, respectively. Copies appear as Appendices B and C to the Petition for Certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing with suggestion that rehearing be in banc, was filed on April 25, 1978 and denied on May 2, 1978. The petitions for certiorari were filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 25.

§ 194. *Trial of right of property; burden of proof*

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

§ 194, supra, was § 22 of an act to regulate trade and intercourse with the Indian tribes, and to preserve peace

on the frontiers, approved June 30, 1834, 4 Stat. 729, printed in full (A. 190) and §§ 12, 16 and 22 also printed (App. E3).

Other statutory provisions referred to herein as helpful in interpreting § 194 are included in Appendix E to the Petition for Certiorari. They are the following:

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143. (App. E1)

An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683. (App. E2)

QUESTIONS PRESENTED FOR REVIEW

On November 13, 1978, this Court granted certiorari in No. 78-160, *Wilson et al. v. Omaha Indian Tribe, et al.*, limited to questions 2 and 3 presented by the Petition, which are the following:

2. Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.

3. Whether the Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in this case.

On the same date, this Court granted certiorari in No. 178-161, *Iowa, et al. v. Omaha Indian Tribe, et al.*,

limited to questions 1 and 4 presented by the petition; which are the following:

1. Whether the State of Iowa is "a white person", and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U. S. C. § 194.

4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.

STATEMENT OF THE CASE

This is a controversy over the ownership of 2900 acres of land on the east bank of the Missouri River in Monona County, Iowa, a few miles north of Onawa, Iowa. Plaintiffs in the United States District Court for the Northern District of Iowa, Respondents here, are the Omaha Indian Tribe and the United States as Trustee for the Tribe. They claim that this 2900 acres is part of the Omaha Indian Reservation which was established on the west or Nebraska side of the Missouri River pursuant to a Treaty of 1854, and that the 2900 acres came into existence on the east side as the result of avulsive actions of the River. The defendants in the District Court, Petitioners here, are the Iowa record titleholders. They claim the land as accretion to Iowa riparian land and their chains of title go back to patents from the Government to that riparian land. The exception is the State of Iowa which claims part of the land as accretions to Iowa's portion of the bed of the River. As between Petitioners Wilson, Lakin and R. G. P., Inc., on the one

hand and the State of Iowa on the other, any differences were resolved by quiet title actions and quitclaim deeds. The plat, Plate 1, App. F (T. Ex. 78, R. 22, 23)² shows the 2900 acres surrounded by the 1943 Iowa-Nebraska Boundary Compact line and the west shore meander line as surveyed by Barrett for the General Land Office in May of 1867. The 2900 acres will sometimes be referred to herein as the Barrett Survey area. North, east and south of the Barrett line is a line marking the Iowa high bank. The area surrounded by that high bank line and the Nebraska-Iowa Compact boundary line will sometimes herein be referred to as the Blackbird Bend area.

The easternmost portion of the Barrett survey area disappeared from the Nebraska side and appeared on the Iowa side of the River during the period of 1867 to 1890. Essentially all of the rest appeared on the Iowa side of the River during the period of 1906 to 1927. While much documentary evidence was obtained by discovery procedures from the files of the B. I. A. proving that the loss of land on the west side of the River was by erosion together with documentary evidence that the increase on the east side was contemporaneously considered to be accretion, there was no indication that anyone ever considered this 2900 on the east side of the river or any part of it to be part of the Omaha Reservation until some-

2 The trial court assigned numbers to plaintiffs' exhibits and letters to defendants' exhibits, double letters for second time through the alphabet, and letters with a number for the third or more times. T. stands for Tribe and the above reference is to Tribe's Exhibit 78, identified at Page 22 and received in evidence at Page 23 of the typewritten transcript of the record. G. Ex. stands for Government Exhibit, W. Ex. for Wilson Exhibit, etc.

time af'er 1962 when Edward L. Cline, an Omaha Indian, went to work for the Tribe with the official title of Economic Financial and Family Counselor to the Tribe (R. 5). In that capacity, he had access to plat books and apparently noticed that in 1867, the west shore meander of the River included the area under the sky now occupied by the 2900 acres. Cline concluded that that geographical area was part of the reservation and determined to get possession of it for the Tribe. Unsuccessful in getting action satisfactory to him from the Bureau of Indian Affairs, Cline, in 1973, 30 days before Easter, with a group of twenty or thirty members of the Omaha Tribe, occupied the Barrett survey area for thirty days, which occupancy was terminated by the arrest and removal of Cline and others from the land (Cline, R. 28A), and the Order of the Iowa District Court ordering Cline and his followers off the land (R. 41). But, Cline persisted and the B. I. A. provided funds for technical investigations (Corke, R. 73). William H. Veeder and Charles P. Corke, B. I. A. employees in Washington, were assigned to direct legal and technical studies (Corke, R. 73). The B. I. A. contracted with E. M. Clark and Associates, Surveyors, to assemble data, make maps, etc. (R. 74). Clark employed a geologist, Charles S. Robinson. They started their work on the case in June of 1973 (R. 793). In September of 1974, they submitted to the B. I. A. elaborate reports, Clark's 66 pages and 22 plates—maps (W. Ex. T, R. 528, 565, 573), and Robinson's 16 pages, plus 7 plates (W. Ex. V, R. 1170, 1172), which were rejected by Corke for the B. I. A., but which were offered in evidence by Petitioners because of their inconsistencies with the testimony of Clark and Robinson at the trial. Those reports

clearly show that the movements of the River in the Blackbird Bend area were essentially complete in the 1920's and before the United States Engineers first commenced work in that area, which was in 1936.

Cline became a member of the Tribal Council on February 18, 1975 (R. 31). He went to Washington with two other members of the Council and conferred with Corke, Veeder and Zuni, the Acting Commissioner of the B. I. A. He was encouraged to occupy once more the Barrett Survey area (R. 32). He, with other members of the Omaha Tribe, with approval by B. I. A. employees, again invaded the Barrett Survey area on April 2, 1975, took Jackson's (Wilson's tenant's) plow from him, seized his fuel tanks (later returned after intervention of the County Attorney), detained Jackson's hired man in the field (released after some negotiations), and drove out Jackson and Peterson, the tenants of Wilson and R. G. P., Inc., respectively, and their employees (R. 2338, 2339, 2341). Jackson and Peterson went into Iowa State Court and after notice of hearing obtained a temporary injunction against Cline and other members of the Omaha Tribe, enjoining them from coming on the Barrett Survey area and from interfering with the farming of said area by Jackson and Peterson and their agents and employees. A copy of that Order of May 16, 1975, is attached as Exhibit C (A. 117) to the Complaint of the Omaha Tribe (A. 100) against Jackson, Peterson and the District Court of Monona County, Iowa No. C75-4026, which Complaint was filed in the United States District Court for the Northern District of Iowa, Western Division on May 20, 1975. In it, the Tribe asked the Federal Court for a stay of the state court injunction and an injunction main-

taining the Tribe in possession of the land. The United States had filed, on May 19, 1975, its Complaint, Case No. C75-4024 (A. 61), against all of these Petitioners except the Sorensons asking for a preliminary injunction maintaining the Tribe in possession pending trial; for a judgment quieting title in the United States for the benefit of the Tribe to the Barrett Survey Area excepting certain lands not described which had been allotted to individual members of the Tribe and sold to nonmembers; and to enjoin Jackson and Peterson from prosecuting their state court suit or attempting to enforce the order entered therein.

Attached to the Tribe's complaint in 75-4026 as Exhibit "B", was a copy of the opinion of the Solicitor of the Department of Interior dated February 3, 1975, in which he stated (A. 114):

... The Army Corps of Engineers undertook a program in the 1940's to rechannelize the Missouri River to reduce flooding and to stabilize the location of the river. The rechannelization had the effect of cutting the Blackbird Bend oxbow off from the rest of the reservation. The oxbow became part of the eastern bank of the Missouri River for the first time. Not only had it shifted to Iowa's jurisdiction under the 1943 Compact, but geophysically, it became contiguous with the eastern bank due to the cessation of flow around the oxbow.

Although the foregoing statement did not bear the slightest resemblance to the facts (since the river movements were essentially complete in the 1920's, long before the U. S. Engineers started work in the area, nevertheless the Honorable Edward J. McManus, the District Judge who handled the preliminary phases of these cases, ac-

cepted it as fact. In his Order of June 5, 1975 (A. 119), he stated:

The plaintiff in each case contends that the Blackbird Bend area became located on the eastern bank through an avulsive change in the course of the Missouri River caused by channelization projects carried on by the Corps of Engineers during the 1940's (A. 120).

Judge McManus further stated in that Order:

The staff of the BIA has concluded, and the Solicitor of the Interior Department concurred in the conclusion, that approximately 3,190 acres in the Blackbird Bend region were still owned by the United States as part of the Reservation. Other than conclusory statements, defendants have produced no evidence to the contrary at this time (A. 123).

On that basis, he issued the preliminary injunction giving possession of the Barrett Survey Area to the Omaha Tribe pending trial. After defendants had time to employ an expert to make a study and a report, they attempted to obtain a hearing from Judge McManus on their application for a return of possession of the land pending trial, but their application and request for oral argument thereon were denied.

On October 6, 1975, the Omaha Tribe filed its complaint (A. 139) in Case No. C75-4067 against all of the Petitioners and numerous other defendants. It claims not only all of the Barrett Survey area, but also all of the rest of the Blackbird Bend area and land in two bends north of it, Monona Bend and Omaha Mission Bend, a total of 11,300 acres more or less. This area is shown shaded on the Plat (Ex. A to Tribe's Complaint, A. 148).

In their answers and counterclaims, in No. C75-4026 (A. 88) and in No. C75-4067 (A. 150), the defendants, State of Iowa and State of Iowa Conservation Commission, denied that either the Tribe or the United States as Trustee for the Tribe owned all or any of the land claimed by them in these cases, and alleged that the State of Iowa owns the bed of the Missouri River between the thalweg and the ordinary high water mark on the easterly side of the River and islands growing up out of that portion of the riverbed; that the land claimed by those petitioners is such land and additional land obtained by quitclaim deeds executed in settlement of boundaries; that land that may at one time have been within the geographical area of the Omaha Indian Reservation in an area now owned by the State of Iowa was eroded and washed away and ceased to exist by reason of action of the Missouri River and the rights of plaintiffs to said land were extinguished thereby. The State and its Conservation Commission further alleged abandonment and laches.

The other defendants in all three cases (A. 67-88, 126-138, 156-175) denied that plaintiffs owned all or any of the land claimed by them and alleged that when the Barrett Survey was made in 1867, land existed on the Nebraska side of the Missouri River that could be described as in the description of the Barrett Survey area but that all of it was eroded and washed away by the action of the Missouri River between 1867 and 1943, and ceased to exist at the described location, having been washed down the river; that new land was created between the years 1867 and 1943 by the process of accretion to the left, or Iowa bank, of the Missouri River, which accretions ex-

tended over all of the area of the earth's surface herein called the Barrett Survey area, and over all of the rest of the area herein called the Blackbird Bend area; that all of said accretion land upon its coming into existence became the property of the riparian owners on the Iowa bank of the Missouri River to whose land it had accreted; that by mesne conveyances from said riparian owners or from persons who obtained title from or against them, the defendants, Wilson, Lakin, R. G. P., Inc., and Sorenson, became and are now the owners in fee simple of the portions of the Barrett Survey area claimed by them respectively and described in their answers and counterclaims by Iowa Section, Township and Range numbers (See land ownership map, App. F). As additional defenses, the said defendants alleged adverse possession and estoppel by laches.

By order entered April 5, 1976 (A. 184), Judge McManus sustained plaintiffs' Motion for Partial Summary Judgment on defendants' defenses of adverse possession, laches, estoppel and abandonment. In the same order, he severed from Number C75-4067, all issues relating to lands, about 8,000 acres, which were not also within the subject res of C75-4024 and C75-4026 (Barrett Survey area), and all issues of damages. The three cases had previously been consolidated. So much of C75-4067 as was a suit to quiet title to the Barrett Survey area remained consolidated with 4024 and 4026.

The consolidated cases came on for trial on November 1, 1976, in Sioux City, Iowa, before Honorable Andrew W. Bogue, District Judge (of Rapid City, South Dakota, sitting by special assignment). The trial took 21 trial days, including a day devoted to inspection of the

subject land by the Court, finishing on December 6, 1976. The transcript of testimony is 3216 pages. There are over 150 exhibits. At the conclusion of the trial, Judge Bogue requested counsel for all parties to submit proposed Findings of Fact and Conclusions of Law by February 15, 1977.

The transcript of the testimony had been transcribed daily, and Judge Bogue was able to study the complete typed transcript of evidence and all of the exhibits after the trial along with the proposed Findings, Conclusions and Briefs submitted by counsel for all parties.

Judge Bogue prepared Findings of Fact and Conclusions of Law (App. B), a written Opinion (App. C), and a Decree (App. D). Of Judge Bogue's findings, the Court of Appeals said (App. A. 39): "In reviewing these findings, our task is not made easier by the District Court's verbatim adoption of defendants' analysis of the evidence and proposed Findings of Fact including defendants' credibility assessments of the witnesses." The 21-page Opinion is entirely the handiwork of Judge Bogue. Of the Conclusions of Law (App. B, 51-61), Judge Bogue adopted defendants' proposed Conclusions in part and rejected them in part. He made seven deletions from defendants' proposed Conclusions and five additions, some quite lengthy. Of the 11 pages, six full pages plus 53 lines on four other pages are Judge Bogue's language. The remainder, much less than half the space occupied by Judge Bogue's conclusions, were adopted from defendants' proposed Conclusions. Of the Findings of Fact (App. B, 2-51), there were 21 different parts of defendants' requested Findings which Judge Bogue omitted from 12 different pages of his Findings. There were 30

parts of 21 pages which Judge Bogue added to defendants' proposed Findings. These insertions of findings not requested by defendants amount to 184 printed lines, equivalent to six pages. The Court of Appeals implied that Judge Bogue adopted the defendants' proposed Findings mechanically (App. A, 23, Note 21), and that the Findings are not the product of the workings of the District Judge's mind. Actually, the extensive revisions the District Judge made in the defendants' proposed findings demonstrate that he was unwilling to adopt proposed findings unless satisfied that they were correct, not merely in general but also in detail.

The District Court Decree (App. D, 2) quieted title in defendants and dissolved the June 5, 1975 preliminary injunction which gave possession of the Barrett Survey area to the Omaha Indian Tribe.

On May 13, 1977, the Court of Appeals stayed the Order of the District Court and reinstated the injunction keeping the Tribe in possession of the Barrett Survey area. It also expedited the appeal and set the oral argument for June 13, 1977, with briefs to be filed by June 10, 1977. The case was argued as scheduled. Ten months later, on April 11, 1978, the 8th Circuit opinion was filed reversing the District Court and directing the entry of "judgment quieting title in the trust lands involved in this action in the United States as trustee, and the Omaha Indian Tribe" (App. A, 66). Motion for rehearing was denied on May 2, 1978 (A. 188).

Petitions for writs of certiorari by petitioners Wilson, Lakin, Jackson and Sorenson (No. 78-160) by petitioners, State of Iowa and State Conservation Commis-

sion of the State of Iowa (No. 78-161) and by R. G. P., Inc., Travelers Insurance Company and Otis Peterson (No. 78-162) were filed on July 28, 1978.

On November 13, 1978, this Court granted certiorari limited as hereinbefore stated (A. 189).

Since certiorari is limited to the question of the construction of § 194, and the question of whether federal or state common law of accretion and avulsion is controlling, we will attempt no extended review of the evidence but will round out this Statement of the Case with a very short statement of facts.

The eastern two and one-half miles of the Barrett Survey area peninsula or meander lobe was about one and one-quarter miles wide from north to south and it became wider further west. The eastern one and one-half miles was described by Barrett as a "low sandy point" and "subject to frequent inundations, entirely worthless for cultivation." (Barrett's field notes, T. Ex. 26d, 26e, R. 20, 22).

By 1879 when the Missouri River Commission mapped the Missouri in this area, (T. Ex. 29, R. 267, 285; W. Ex. U, R. 1143, 1145; App. A 11), the eastern mile of the south side and two miles of the north side of Barrett's meander lobe had disappeared, and the thalweg of the river was running through that area. Defendants' expert witnesses³

³ John F. Kennedy is professor in the Division of Energy Engineering at the University of Iowa and Director of the Iowa Institute of Hydrologic Research. He has a Ph.D. degree in Civil Engineering. From 1961 to 1966 he was assistant and then associate professor in charge of the Massachusetts In-

(Continued on next page)

were all of opinion that the Blackbird Bend meander having reached its limiting width, its thalweg gradually moved west completely eroding away the low sandy point before it and throwing up sandbars behind it in the slack water.

The trial court having seen and heard the witnesses and having inspected the land in controversy, accepted the

(Continued from previous page)

stitute of Technology hydrodynamics laboratory program in river mechanics and sediment transport. Most of his professional activities have been concerned with river mechanics, how rivers change their form, including the development of meanders. He has been a consultant to many foreign governments including the governments of Costa Rica, Venezuela and Germany with respect to problems of river training.

George R. Hallberg is chief of the Research Division of the Iowa Geological Survey and adjunct professor of geology at the University of Iowa and at Iowa State University. He has a Ph.D. in Geology for which his specialization was quaternary geology which is a study of surficial unconsolidated materials and land forms that relate to them and the processes by which they are formed, including movements by river systems. He had special training in hydrology and soils. Pursuant to invitation he has lectured at several national meetings of national scientific organizations. He directs and coordinates geological investigations under the Iowa Co-operative Soil Survey Program which includes mapping the soils of the Missouri River bottom lands and the subsurface sediments and to establish their nature in relationship to land forms and to the movements of the river, and has also worked with the Mississippi River and its tributaries.

Raymond L. Huber is a civil engineer employed by the U. S. Corps of Engineers from 1926 until his retirement in 1963. From 1936-1963 he was in charge of the design work of stabilizing the Missouri River channel throughout the entire area of the Omaha District which included the Missouri River from Rulo, Nebraska, to its source at Three Forks, Montana. For ten years he served as a member of the committee of the American Society of Civil Engineers engaged in the study of the meandering of alluvial rivers. Since his retirement he has served as a consultant on river stabilization.

opinions of the Petitioners' experts. The Court of Appeals, however, said that the trial court's conclusion was clearly erroneous; that the evidence was speculative and conjectural, and that neither side proved either avulsion or accretion (App. A55).

In 1894 the area under the sky formerly occupied by the east end of the Barrett survey peninsula was surveyed as accretion land by the county surveyor of Monona County, Iowa and apportioned to the Iowa riparian owners accordingly. (W. Ex. X3, R. 1779, 1784). There is no record of any contemporary suggestion that there had been any avulsion in that area.

The second half of this case involves the southward migration of the meander point on the Iowa side immediately north of the Barrett Survey peninsula and the disappearance of the rest of the Barrett Survey area from the Nebraska side of the river between 1906 and 1927.

The Petitioners' experts were of opinion that between 1906 and 1923 the thalweg gradually eroded its way southward and the riverbed behind it became filled by deposition; that the land lying east and north of the 1923 river is all accretion land added by deposition to the Iowa high bank; that all of the land lying within the area formerly occupied by the Barrett meander lobe is likewise accretion to the Iowa northern or eastern high bank. The trial court agreed.

As with the evidence with respect to the movement of the river between 1867 and 1879, the Eighth Circuit found the evidence with respect to the movement of the river between 1906 and 1923 to be speculative and conjectural (App. A62, 65), and accordingly that it was clearly erro-

neous for the District Court to decide the matter in favor of Petitioners because Petitioners had the risk of non-persuasion by reason of § 194.

The Eighth Circuit's conclusion that petitioners did not sustain their burden of proof under § 194 was influenced by its application of its version of the federal common law of accretion-avulsion—that there may be an avulsion with no identifiable fast land left in place (App. A. 42); that an avulsion may occur “within the bed of a stream” (App. A38) i. e. over or around a sand bar or piece of shore, without the river abandoning its old bed and seeking a new one. In announcing this theory as federal law, the Eighth Circuit rejected the standard definition of avulsion and accretion as reflected in 93 C. J. S. 750, 751, *Waters*, Sec. 76, derived from *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) and other cases decided by this Court.

SUMMARY OF ARGUMENT

I.

The Eighth Circuit erroneously construed 25 U. S. Code § 194 to make it applicable in this case.

1. It construed “an Indian” to include an Indian tribe and the United States as trustee for a tribe, but everybody knows that it takes more than one Indian to make a tribe.

Congress in the Indian Non-Intercourse Act of 1834 (printed in full, A. 190), of which § 194 was § 22, used appropriate language to refer to Indian tribes.

The predecessor of the 1834 § 22 was § 4 of the 1822 Non-Intercourse Act which used the plural "Indians." The change to the singular in 1834 made it clear that individuals, not groups, were contemplated.

At the same time a corresponding change was made in § 12 which in its 1802 form (App. E2) made invalid any conveyance of and "from any Indian, or nation or tribe of Indians" unless made by treaty or convention. The words "Indian, or" were deleted in the 1834 Act. Thus, Congress made it clear that § 12 applied only to tribes and § 22 only to individual Indians, eliminating duplication of protective measures.

2. The Eighth Circuit construed "a white person" to mean any non-Indian, but everybody knows that not every non-Indian is a "white person."

Where Congress meant all non-Indians, it used appropriate language such as "any person other than an Indian."

Congress used the expression "a white person" in only two sections of the 1834 Act, § 22 (§ 194) and § 16. With respect to the latter, this Court held that "a white person" did not mean "not an Indian" and did not include a Negro. *U. S. v. Perryman*, 100 U. S. 235 (1880).

A purpose of federal Indian legislation was to protect Indians from the fraud and imposition of traders, who appear to have been white individuals, not other Indians, or Negroes, or corporations or states.

There is no evidence in this case that any of the defendants are "white persons"—members of the Caucasian race.

3. "Previous possession or ownership" as used in § 194 refers to the property in controversy and if that is accretion to Iowa riparian land its relation to the latter is that of fruit to the tree; it is not the same land as that which formerly occupied the same area under the sky but which was eroded and washed down the river. By assuming that the present land in the area is the same land that was there in 1867, the Eighth Circuit begged the question—assumed the ultimate fact to be proved by the Tribe—that the land in controversy arrived on the Iowa side of the river by the avulsion route—not as accretion. § 194 does not purport to relieve "the Indian" of the necessity of proving the facts which would make § 194 applicable. And as Judge Bogue pointed out, proof that the land in controversy is the same land as that owned or possessed by "the Indian" in 1867 would prove "the Indian's" case, and he would have no need to invoke § 194.

4. "Whenever" does not mean "always" and "whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership" does not mean that previous possession or ownership no matter how remote in time, or how changed the circumstances, and how many and strong the opposing presumptions and inferences, will always make out a presumption of title.

The presumption of continuance of condition or state of facts is one of variable weight depending on circumstances. With a time lapse of 50 to 100 years, its weight

is nil—the presumption does not exist. This is especially true in such a case as this where the circumstances are entirely different from those existing at the time of the supposed previous possession or ownership.

A presumption of title from previous possession or ownership could not arise because of other stronger opposing presumptions which include:

The presumption of ownership in petitioners from their record title, and from their conceded peaceful possession of forty years or more.

The presumption that the land being on the east side of the Missouri River was in Iowa before the 1943 Boundary Compact.

The presumption that public officers have properly discharged their official duties. No officer or employee of the Government, B. I. A. or other, reported any avulsion or asserted any claim to the land until 1975. On the other hand, it was surveyed as accretion land by surveyors for Monona County, some of it as early as 1894.

The strong presumption, founded on long experience and observation that a change in the thalweg of a river has occurred by reason of gradual erosion and accretion rather than by avulsion. Sometimes called the “rule of the live thalweg”, it requires “clear and convincing” evidence of a cutoff to satisfy the burden of persuasion of one claiming an avulsion.

5. “Burden of proof” as used in § 194 should be construed to mean burden of going forward with evidence—not risk of non-persuasion. Burden of proof in an ambiguous term—having two meanings. Construed as by

the Eighth Circuit as meaning risk of non-persuasion in § 194, in such a case as this it results in taking property from “the white person” and giving it to “the Indian”, making the statute an invidious racial discrimination which is unconstitutional. But, construing “burden of proof” in § 194 to mean burden of going forward with evidence would not have such a devastating effect on petitioners’ rights and would come closer to eliminating grave doubts as to the constitutionality of § 194.

II.

The Eighth Circuit erred in holding that federal and not state common law of accretion-avulsion is applicable in these cases.

The Eighth Circuit conceded that the basic rule is that the laws of the several states determine the ownership of the banks and shores of waterways, as of other real property, but it stated that there are two exceptions to that rule applicable in this case.

1. Its first exception is that where the navigable stream is an interstate boundary, the United States Supreme Court in the exercise of its original jurisdiction over suits between states has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. The Court of Appeals argues that that exception should apply even though the Iowa-Nebraska Boundary Compact of 1943 fixed the state boundary, because a determination of this case might also incidentally determine where the boundary was in 1879 or 1890 or 1923 or 1927. But where the boundary as such was then is of no importance to any

of the parties to this litigation, and it provides no reason for displacing state property law with federal. In *Nebraska v. Iowa*, 406 U. S. 117 (1972), this Court construed the Compact as calling for application of state law and determined which state law was applicable. Blackbird Bend was not excepted from the Compact.

2. Secondly, the Eighth Circuit found a "compelling reason for applying federal law" in "the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated" (App. A. 15). But that special relationship is to protect the Tribe from loss of property by fraud and over-reaching on the part of others. That is the reason for the restraints on alienation of tribal land.

In its Indian laws, Congress made no provisions for protecting the tribes from the actions of the Missouri or other rivers. The Missouri is no respecter of persons, and a tribe, like any other riparian land owner stands to gain by accretion to its land and to lose by erosion of its land. The restrictions on alienation are not involved. State common law of accretion-avulsion is not discriminatory—it applies to all alike, Indian and non-Indian. In this case the Eighth Circuit version of federal law is more advantageous to the tribe. In another case the reverse may be true. The fact that the United States asserts a claim and is adversely affected by the application of state law does not prevent state law from applying unless state law comes into direct conflict with federal policy. But no federal policy with respect to riparian rights of tribes appears.

One reason why it is important to apply state law with respect to real property is to maintain uniformity

in the law in the state. This case, as the Court of Appeals has decided it, would be a striking example of non-uniformity with a crazy quilt pattern of forty-acre tracts of supposedly Indian trust lands where federal law is to be applied and other forty-acre tracts occupying areas where fee patented land once existed and where state law is to be applied.

No conflict between federal policy and state law exists here and state law should be the rule of decision.

ARGUMENT

Introduction

The District Court found that so much of the Barrett Survey area of 1867 as lay east of the 1879 thalweg had by 1879 been completely eroded away and washed down the river, and that in its place new land was added by deposition of alluvium—accretion to the Iowa riparian land (App. B, 28). Likewise as to the movement of the river between 1879 and 1923 the District Court found that after moving to the northerly high bank the river made a southern migration through the Blackbird Bend area by erosion on the Nebraska side and deposition on the Iowa side, which deposition was accretion to the northerly and easterly Iowa high banks (App. B, 44, 45), and further found that there was no evidence of any avulsions between 1923 and 1940 and that all of the land formed to the east of the Missouri River in the Blackbird Bend area as its channel was located in 1940 was accretion to the Iowa riparian land (App. B, 47).

As to burden of proof, the District Court said (App. C, 20):

... Plaintiffs have the burden of persuasion as to facts which establish their title; (2) similarly, Defendants bear the burden of persuasion on their counterclaim to quiet title; (3) failure of either of the two groups of claimants to sustain its burden of proof does not, standing alone, entitle the other side to relief. This Court wishes to state, however, that, after thorough and careful review of the evidence, it is satisfied that the findings of fact are supported by a preponderance of the evidence and would not be altered by any different allocation of the burden of persuasion.

The Court of Appeals disagreed. It placed the burden of persuasion on the defendants because of § 194 and said:

We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194 (App. A, 62). Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194. (App. A, 65).

In coming to that conclusion, it said:

Although it is possible that the land represented by bar C may have completely eroded, ... the record is insufficient to prove what actually occurred. (App. A, 44).

None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstances shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion (App. A49).

We conclude on the basis of an overall review of the record that it is entirely speculative to determine

when or how the thalweg moved to the position shown on the 1923 map (App. A65).

These established facts do not prove that either accretion or avulsion caused the river's movement (App. A62).

In coming to its conclusion, the Eighth Circuit was obviously influenced by its impression that there are important differences between the federal common law of accretion and avulsion and state common law on that subject. It seems to concede that under state law proof of avulsion requires a showing of identifiable land in place which has been severed from one bank of the river and become attached to the other; and also that state law does not recognize as an avulsion a movement of the thalweg within the bed of the stream, but requires that the river abandon its old bed and seek a new one. The Court of Appeals said (App. A13): "We hold that the governing principles of federal law vary significantly with the trial court's construction of state law and that the court erred in failing to apply that federal law." And with regard to what it considered the federal law of accretion and avulsion to be, the Court of Appeals said (App. A38, 39):

"... plaintiffs claim that a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. ... It was error for the trial court to reject the plaintiffs' legal theory. ..."

So the Court of Appeals rejected the findings of the District Court on the theory that the evidence (lay witness, map, documentary of contemporary observation, and expert opinion) was, because of § 194, not sufficient to support those findings that the river as it moved eroded away all the bars, shore and fast land before it and deposited accretion to the Iowa riparian land behind it; and the Court of Appeals applied its version of federal law to hold that defendants did not sustain their burden of proof because in its opinion the defendants had not satisfactorily disproved "the possibility" (App. A44) that Bar C of 1879 was a remnant of the 1867 Barrett low sandy point [shoreland] or that land on the Iowa side of the river in 1923 was previously shore of the Nebraska side because "this sandy area would not reveal any conspicuous identifiable features." (App. A63). In other words, the Court of Appeals held that defendants failed to prove that there had been no sudden perceptible movement of the thalweg over or around sand bars or shoreland which constituted parts of the bed of the river on the Nebraska side of the 1867 thalweg.

I.

The Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable to this case.

(1) The Eighth Circuit erred in holding that the words "an Indian" in § 194 include an Indian Tribe and the United States as trustee for a tribe.

The Eighth Circuit gave no real consideration to the above point. It discussed § 194 in six pages (App. A20-

25) and concluded that it cast the risk of non-persuasion on the defendants, which necessarily meant that it construed "an Indian" as used in the section to mean an Indian Tribe and the United States as trustee for a tribe. The Eighth Circuit obviously assumed that Congress in adopting the Indian Nonintercourse Act of 1934 was not using words in their ordinary commonly accepted meanings and that Congress did not know how to express itself with precision. The contrary clearly appears when the entire statute is examined.

25 U. S. Code § 194 is § 22 of "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, 4 Stat. 729 (A. 190-204). Congress was quite capable of finding appropriate language to refer to Indians without including tribes, to refer to tribes without including individual Indians, and to refer to both at the same time. In the thirty sections of that statute Congress used the words, "Indian" or "Indians" numerous times often prefixed by "any". But it also used the expressions "the Indian tribes" or "any Indian tribe" or "any Indian nation or tribe of Indians" (Sections 2, 3, 19, 29, 12, 17) where the section was to be applicable to the tribes or nations rather than to individual Indians. And where the section was to apply both to the tribes and individual Indians, it used expressions such as "any Indian or Indian tribe" (Sec. 9) or "any Indian nation, tribe, chief or individual" (Secs. 13, 14, 15). Had Congress intended § 194 to apply to tribes and to the United States as trustee for tribes it would have used one of the latter expressions in place of "an Indian".

Furthermore, it should be noted that the ancestor of § 194 first appeared in the 1822 Act as § 4 (App. E2) and used the plural "Indians"—"in which Indians shall be a party on one side and white persons on the other." This was changed to the singular in the 1834 Act (§ 22, App. E3, 4)—"an Indian . . . a white person." The change from plural to singular made it clear that individuals—not groups—were contemplated.

The Solicitor General's brief in opposition to the petitions for certiorari at p. 11, suggests that the change from plural to singular was to make the syntax of § 194 consistent. That could have been accomplished by changing the latter part from singular to plural but instead Congress changed the first part from plural to singular.

A reason for the change from plural to singular appears to be the change in § 12 of the "Act to regulate trade and intercourse with the Indian tribes" etc. In its 1802 form (App. E2), it made invalid any conveyance of land "from any *Indian, or* nation or tribe of Indians" unless made by treaty or convention. (Emphasis ours.) The 1834 revision eliminated "Indian, or" from § 12 (App. E3). Thus the 1834 changes made it clear that the protection of § 12 applied only to Indian tribes and nations, not to individual Indians and protection of § 22 (§ 194) applied only to individual Indians, not to nations and tribes, thus eliminating duplication of such protective measures.

Surely Congress would be hard pressed to find any reason to give an Indian tribe the burden of proof advantage § 194 purports to give to "the Indian." The Indian tribes have rightly or wrongly been given the advantage of exemption from state statutes of limitations.

They are given the additional advantage of unlimited financial support by the Federal Government for their litigation.⁴ It is certainly understandable that Congress would not add to those preferences a tribal burden of proof advantage.

(2) The Eighth Circuit erred in holding that the words "a white person" in § 194 means all non-Indians—states, corporations and individuals whose race or color is not shown (App. A25).

The sovereign State of Iowa is not a white person. It is not even a person. In *United States v. United Mine Workers of America*, 330 U. S. 258, 275, 91 L. Ed. 884, 67 S. Ct. 677 (1947) the Court said:

The Act does not define "persons". The common usage of that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provisions, Rev. Stat. § 1, 1 USCA &1, 2 FCA title 1, § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.

⁴ The record shows that the B. I. A. paid Elmer Clark, its investigator-surveyor, and V. T. N. Colorado, Inc., the successor to Clark's surveying business, for their work and that of Charles Robinson, a geologist, and his associates, in preparation of these cases for trial, more than \$250,000.00 (R. 661). In addition to that, they were paid for their attendance and testimony at the trial. The B. I. A. paid Raul McQuivey, a hydrologist, for his preparation for trial and testimony, \$75,000.00 (R. 1655). Services of Veeder and Corke as B. I. A. employees supervising the investigation were supplied the Tribe by the B. I. A. as were fees for counsel for the Tribe.

R. G. P., Inc. and Travelers Insurance Company are corporations and as such they may be persons but they are not white persons. White persons have to be flesh and blood people—human beings. The individual petitioners could be white persons. But the tribe and the United States apparently did not think enough of their § 194 argument to take the trouble to prove that any of the individual petitioners were white.

The Eighth Circuit, without really addressing the issue, construes “a white person” to mean any non-Indian (App. A25). Here again a look at the entire 1834 Act makes it apparent that Congress would not have used the expression “a white person” had it meant any non-Indian. In Sections 4, 7 and 8, it used the words “any person other than an Indian” showing that it was quite capable of expressing the idea without ambiguity. When it meant to include Indians and non-Indians it said “any person whatever” (Sec. 21), “any person or persons whatever” (Sec. 14) “any person”, “all persons”, or “every person” numerous times. For more restrictive description expressions used were “any citizen or other person” (Secs. 13, 14, 15), “any citizen or inhabitant of the United States” (Sec. 17), “a foreigner” (Sec. 6), “persons except citizens of the United States” (Sec. 5) and “any white person or Indian” (Sec. 20). In only two sections was the expression “a white person” used—Section 22 (§ 194) and Section 16. The same contention that the statutory language “a white person” should be construed to mean a non-Indian was made many years ago with respect to § 16. Section 16 provided that when a white person was convicted of a crime committed in Indian country in which the property of a friendly Indian was taken or destroyed,

the person so convicted should be sentenced to pay the friendly Indian double the value of the property, and if the offender was unable to pay at least the value, the government should pay the amount by which the offender’s payment fell short. In *United States v. Perryman*, 100 U. S. 235, 25 L. Ed. 645 (1880), suit was brought by a friendly Indian against the United States for the value of twenty-three head of beef cattle stolen from him by a Negro who was duly convicted of the theft. This Court held that the United States was not liable. The Court said:

It is contended, however, that the term “white person”, as here used, means no more than “not an Indian”; in other words, that the intention of Congress was to make the United States liable in the way indicated for all injuries to the property of friendly Indians by persons engaged in crime within the Indian Territory who were not themselves Indians. Such, we think, is not the true construction of the statute.

The Court pointed out that the words “a white person” were substituted for “any such citizen or other person” used in previous statutes (§ 4, Act of 1802, App. E1) and that if Congress had wanted liability of the United States to arise by reason of theft by Negroes it could have continued to use that former language. Likewise with respect to § 22 (§ 194). If Congress had meant non-Indians it could have said so, or used the language of the former statutes or of other sections of the 1834 Act referred to above.

Sections 16 and 22 (§ 194) are similar in several respects. Both refer to Indian in the singular—“an Indian” and “the Indian” (Sec. 22) and “any friendly Indian” and “such friendly Indian” (Sec. 16). Both refer

to "a white person". Both are designed to provide a benefit or advantage to the Indian, Section 16 where the white person committed a criminal offense with respect to the Indian's property, and Section 22 when there is a trial about the right of property regardless of whether or not a criminal offense was involved. Some of the background of § 194 was a problem with respect to the Indian traders. In the Report of the House of Representatives Committee on Indian Affairs, Rep. No. 474, dated May 20, 1834, reporting the bill which became the statute above referred to, it was stated (at p. 11):

"The Indian trade, as heretofore, will continue to be carried on by licensed traders. The Indians do not meet the traders on equal terms and no doubt have much reason to complain of fraud and imposition."

The traders no doubt were white persons and when they were guilty of fraud and imposition their victims were individual Indians, not tribes.

Congress used the same words "a white person" in both §§ 16 and 22. It is highly improbable that the same words would have different meanings in the two sections of the same statute.

(3) The Eighth Circuit erred in holding that the words "previous possession or ownership" in § 194 includes possession or ownership of land or shore in the same area under the sky, i. e., same latitude and longitude, as the land in controversy regardless of whether or not the land or shore previously possessed on the west side of the river had been completely eroded away and replaced by new accretion land on the east side of the river.

The trial court held (App. C18-20) that § 194 was not applicable to this case because by its terms to make it applicable "the Indian" must first "make out a presumption of title in himself from the fact of previous ownership"; that to do that "the Indian" would have to show that the land on the Iowa side of the river now claimed by "the Indian" is the same land he owned on the Nebraska side in 1867, not new land added by accretion to the Iowa riparian land, and that if "the Indian" could prove that, he would not need § 194 because he would have proved his case without its help. The Eighth Circuit (App. A21) rejected that reasoning. It seems to hold that even if the 1867 land has been eroded away and replaced in the same area under the sky by accretion, it is the same land with a mere change of title. Here the Court of Appeals for the Eighth Circuit takes a position in direct conflict with the Court of Appeals for the Ninth Circuit which said in *Beaver v. United States*, 350 F. 2d 4 (C. A. 9, 1965):

The tract in question is in the same physical location as land patented to appellant's predecessor in title in 1914, and, at that time, located in Arizona. * * * If accreted land, it is *not* the land originally patented by the United States in 1914. * * * Appellants equate the precise land lost by erosion from the land on the Arizona side of the river with the precise land gained by accretion on the California side. There is not "physical identity" between the two areas of land, even though each is described as within the same Section 4, Township 9 South, Range 22 East. San Bernardino Meridian.

The rationale for the above is stated by this Court in *County of St. Clair v. Lovington*, 90 U. S. 46, 23 L. Ed. 59 (1874) as follows:

The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase.

If accretion, this land now on the Iowa side of the river is not the same land which once existed on the Nebraska side, transferred from the Omaha Tribe to the Iowa riparian owners by conveyance executed by the Missouri River as attorney-in-fact for the Tribe. On the contrary, it is an increase in the land of the Iowa riparian owners whose patents from the Government carried with them a vested right to such future increase. Defendants' titles descend to them from these riparian owners through mesne conveyances. Defendants bought the fruit from the riparian owners' trees, the increase from their flocks.

The Eighth Circuit says that the District Court presumes "that the reservation land has in fact been destroyed." Actually the Eighth Circuit presumed that it has not been destroyed, a presumption which is contrary to other presumptions or strong inferences favoring Petitioners which we shall presently describe.

In summary on this point, the Eighth Circuit (Step 1) assumed that the Barrett Survey area of 1876 was the same land and shore which was in the possession or ownership of the Omaha Tribe in 1867; from that "fact of previous possession or ownership" so assumed the Eighth Circuit concluded (step 2) that "the Indian" made out "a presumption of [present] title" in himself; from that presumption the Eighth Circuit concluded (step 3) that § 194 placed the burden of proof (which the Eighth Cir-

cuit says means the risk of non-persuasion) on the defendants; the Eighth Circuit then finds (step 4) that the defendants failed to sustain their burden of proof and that therefore the Barrett Survey area was transferred to the Iowa side of the river by an avulsion or avulsions—which was what the Eighth Circuit assumed in the first place.

(4) The Eighth Circuit erred in construing the clause in § 194—"whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership" to mean that "the Indian" does make out a presumption of title in himself from the fact of previous possession or ownership regardless of how remote in time that possession or ownership, how changed the circumstances and how many and how strong the contrary presumptions and inferences.

The presumption of continuance of condition or state of facts is one of variable weight depending on circumstances. It is described in 29 Am. Jur. 2d 285, *Evidence*, § 237 as follows:

When the existence of a condition or state of facts is once established by proof, an inference or rebuttable presumption arises that the condition or state of facts continues to exist as before, until the contrary is shown. Such inference or presumption is not a rule of law to be applied in all cases, with or without reason, but rather it calls for the exercise of sound discretion by a trial judge according to the likelihood of the persistence of a condition or fact under the circumstances of the case at bar. In general, with the lapse of time such inference or presumption loses probative force. Accordingly, the only rule that can

be formulated as to when the inference or presumption of continuance will arise is the broad one calling for a discretionary determination in which the nature of the subject matter and the time interval must figure prominently.

And in 29 Am. Jur. 2d 287, *Evidence*, § 239 it is said:

Title to, or ownership of, property shown to have existed in a particular person, is presumed to continue to exist until such time as it appears from the evidence that such person was divested of it by his own act or by operation of law. The weight of such a presumption is affected by such factors as the *length of time that has elapsed*, the character of the property as salable, consumable, or perishable, and the character of the alleged owner as thrifty or extravagant. (Emphasis added.)

Among other cases cited as supporting the above excerpts is *Maggio v. Zietz*, 333 U. S. 56, 92 L. Ed. 476, 68 S. Ct. 401 (1948), where this Court vacated an order affirming a district court order finding an officer of a bankrupt corporation to be in contempt of court for failing to comply with an order requiring him to turn over certain property to the trustee in bankruptcy. This Court held that the courts below gave too much weight to the presumption of continued possession. This Court said (333 U. S. at p. 65):

Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason.

And (333 U. S. at p. 66):

Of course, the fact that a man at one time had a given item of property is a circumstance to be weighed

in determining whether he may properly be found to have it at a later date. But the inference from yesterday's possession is one thing, that permissible from possession twenty months ago quite another.

And we might add, pertinent to the case at bar—the inference permissible from last year's possession is one thing, that permissible from possession more than one hundred years ago (when the Barrett Survey area was last known to remain intact on the Nebraska side of the river), or from possession more than fifty years ago (when the last sliver of the Barrett Survey area previously remaining disappeared into the river) quite another.

But the lapse of time is not the only reason why “the Indian” does not “make out a presumption of title in himself from the fact of previous possession or ownership. The circumstances are entirely changed from those existing at the time of the supposed previous possession or ownership. The land in controversy is not identifiable as the same land existing in that location under the sky in 1867. It is in a different state. It is on the opposite side of a great river. It has been occupied, cleared, improved and farmed by defendants and their predecessors in title for more than forty years according to the Tribe's pleading—actually much longer.

Furthermore, the feeble presumption referred to could never exist because it is countered by other stronger presumptions.

(a) **The presumption of ownership which follows record title.** Petitioners are the record title holders. Their abstracts of title are in evidence (W. Ex. W, R. 1787, 1788; W. Ex. X, X1, X1A, R. 1789, 1790). Questions of title as between the State of Iowa and other principal peti-

tioners were settled by quiet title decrees (W. Ex. AA, BB, CC, R. 1793, 1794) and quitclaim deeds (Ia. Ex. M8, N8, R. 1954, 1958, A. 258). This presumption is stated in 29 Am. Jur. 2d 283, *Evidence*, § 234.

(b) **The presumption of ownership arising from possession.** It is conceded that the petitioners had peaceful possession of this property for more than forty years prior to the commencement of this litigation. This presumption is stated in 29 Am. Jur. 2d 283, *Evidence* § 234. In *Fletcher v. Fuller*, 140 U.S. 534, 30 L. Ed. 759 (1886), this Court said:

The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin.

* * *

It is not necessary therefore, in the case mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed.

(c) **The presumption that the land, being on the east side of the Missouri River (before the 1943 Boundary Compact) was in Iowa.** In *Kitteridge v. Ritter*, 172 Ia. 55, 151 N. W. 1097 (1915), the Court said:

(1) The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa.

(d) **The presumption that public officers have faithfully performed their duties.** Had there been an avulsion it surely would have been the duty of the officer in charge of the Omaha Indian Agency to report it to the Commis-

sioner of Indian Affairs and also to assert a claim to the land in question within a reasonable time, not 50 or 95 years later. Since no such report was made and no such claim asserted, it may be inferred that there was no avulsion to report and no basis for any claim to be asserted. On the other hand, Monona County surveyors surveyed the land as accretion to Iowa riparian land, some of it as early as 1894 (W. Ex. X3, R. 1779, 1784).

In *United States v. Chemical Foundation*, 272 U.S. 1, 71 L. Ed. 131, 47 S. Ct. 1 (1926), this Court said:

The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.

(e) **The strong presumption, founded on long experience and observation, that a change in the thalweg of a river has occurred by reason of gradual erosion and accretion rather than avulsion.** In *Mississippi v. Arkansas*, 415 U.S. 289, 39 L. Ed. 2d 333, 94 S. Ct. 1046 (1974), in his dissenting opinion Mr. Justice Douglas quoted from the special master's report (415 U.S. 295, 296, 29 L. Ed. 2d 338):

The *burden of persuasion* was upon Arkansas. Initially Arkansas conceded that Mississippi (415 U.S. 2961) had met its initial burden, aided as it was by the presumption that the change in the thalweg of the river was the product of accretion. (Emphasis ours.)

The majority opinion states (415 U.S. 294, 39 L. Ed. 337):

We agree with the Special Master's evaluation of the evidence and conclude, as he did, that Arkansas did not sustain its burden of rebutting Mississippi's conceded *prima facie* case, a burden the Arkansas court

has described as "considerable." *Pannell v. Earls*, 252 Ark. 385, 388, 483 S. W. 2d 440, 442 (1972).

In the cited case the Supreme Court of Arkansas said:

When land lines are altered by the movement of a stream, the weight of authority, both state and federal, appears to recognize a *strong presumption, founded on long experience and observation*, that the movement occurs by gradual erosion and accretion rather than avulsion. *United States Gypsum Co. v. Reynolds*, 196 Miss. 644, 18 So. 2d 448 (1944); *Dartmouth College v. Rose*, 257 Iowa 533, 133 N. W. 2d 687 (1965); *Kitteridge v. Ritter*, 172 Iowa 55, 151 N. W. 1097; *Bone v. May*, 208 Iowa 1094, 225 N. W. 367. (Emphasis ours.)

Elsewhere called the "rule of the live thalweg" it requires "clear and convincing" evidence of a cutoff to satisfy the burden of persuasion of one claiming an avulsion. See p. 17 of Special Master's Report "in all things confirmed" by this Court in *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966).

In view of the length of time elapsing since the Indians' "fact of previous possession or ownership", the striking change of circumstances, and the superior strength of the opposing presumptions and especially of the rule of the live thalweg, it was impossible for "the Indian" to "make out a presumption of title in himself from the fact of previous possession or ownership." And it was error for the Eighth Circuit to construe the language of the statute—"whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership" to mean that "the Indian" does make out a presumption of title in himself whenever he proves that he has had previous possession or ownership.

(5) The Eighth Circuit erred in construing the words in § 194 "burden of proof" to mean "risk of non-persuasion" instead of burden of going forward with evidence.

At this point we will refer to a canon of statutory construction stated in 16 Am. Jur. 348, *Constitutional Law* § 145, as follows:

It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which will uphold it, even though the construction which is adopted does not appear to be as natural as the other.

And in § 146:

The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score.

In 29 Am. Jur. 2d 154, *Evidence* § 123, it is stated:

The term "burden of proof" has two distinct meanings. In its strict sense, the term denotes the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises, whether civil or criminal. In a secondary sense the term "burden of proof" is used to designate the obligation resting upon a party to meet with evidence a prima facie case created against him—that is, the duty of proceeding

with evidence at the beginning, or at any subsequent stage, of the trial in order to make or meet a prima facie case. The burden of proof in this secondary sense means, in short, the necessity of going forward with the evidence, and it is sometimes expressed by the term "burden of evidence."

For the reasons stated in our petition for certiorari (No. 78-160, pp. 11-18), it appears that § 194 as construed and applied by the Eighth Circuit in this case is an invidious racial discrimination against the "white person" in favor of the "the Indian" and deprives "the white person" of his property without due process in violation of the Due Process Clause of the Fifth Amendment. To avoid what appears to be at least a grave doubt as to the constitutionality of § 194, it would appear that the more innocuous meaning of "burden of proof" should be chosen, construing those words to mean burden of going forward with evidence—not risk of non-persuasion.

II.

The Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in these cases.

The Eighth Circuit devotes seven pages of its opinion (App. A13-20) to this subject captioned "III Choice of Law." First, it recognized "the basic rule that the laws of the several states determine the ownership of the banks and shores of waterways", reaffirmed in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977) But to that rule it found two exceptions which it deemed applicable in this case.

(1) The fact that the river originally and presumably until 1943 was the boundary between Iowa and Nebraska does not justify the application of federal common law of accretion-avulsion in this case at this time.

The Eighth Circuit based its first exception to the general rule on the following excerpt from the *Corvallis* case (App. A13):

If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

With respect to that, the Court of Appeals goes on to say (App. A14):

In this case any claim that the reservation's eastern boundary had changed would of necessity have concerned the interstate boundary between Iowa and Nebraska, at least until 1943, thereby invoking federal law since both boundaries were located at the thalweg of the Missouri River.⁵

⁵ It is not accurate to say that the boundary of the Reservation was located at the thalweg. The Treaty of 1854 did not describe the Reservation. It was later selected and located in the Blackbird Hills area (T. Ex. 7, R. 11,13,A.265). Its outside boundaries were first surveyed and described by the surveyor, Barnum, who described its eastern boundary as the Missouri River—not the center or middle or thalweg of the river (T. Ex. 8A, R. 13,14,A.269). See also, p. 3 of the Frizzell memo, Ex. B attached to and made a part of the Tribe's complaint in C 75-4026 (A. 109) which memo though absolutely misrepresenting some facts seems to accurately describe the eastern boundary of the reservation as the river, not the thalweg. Nebraska received title to the bed of the river west of the thalweg under the equal footing doctrine when it was admitted to the Union in February of 1867. Nebraska did not

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We may concede that if these cases had been litigated prior to 1943, they might have involved a determination of the boundary between Iowa and Nebraska. But they were not filed or tried before 1943 and they do not involve a determination of a boundary between states.

The Eighth Circuit continues (App. A15) with some confusing language about application of the Boundary Compact and concludes that:

"Since the issue concerns who held good title to the land in question prior to 1943, federal law must be applied."

That conclusion by no means follows from the rule that federal common law is applied "to determine the effect of a change in the bed of the stream on the boundary." A determination of the state boundary as of 1943 will have no effect on the present state boundary. Although certain determinations of land ownership may turn on the same facts as determinations of the state boundary as of prior to 1943, such as 1879 or 1923, neither Nebraska, Iowa or the United States, has any legal interest in the determination of the state boundary as of 1943. As a basis for application of federal common law of accretion-avulsion determination of state boundaries was eliminated by the Compact.

(Continued from previous page)

relinquish ownership of the bed of the river to the riparian owners (including the Omaha Tribe) until 1906, *Kinthead v. Turgeon*, 74 Neb. 573, 104 N. W. 1061 (1905); 74 Neb. 580, 109 N. W. 744 (1906). The low sandy point, east mile and a half of the Barrett Survey area, which disappeared between 1867 and 1879 (which plaintiffs claim was cut off and defendants say was eroded away) was shore, below the ordinary high water mark, part of the bed of the river then owned by the State of Nebraska.

To hold that determination of title to land along the river as the river existed before 1943 must be made under federal common law because such determination may incidentally, and as a mere matter of historical interest, locate the state boundary as it existed sometime before 1943, would be an unwarranted expansion of the rule that federal common law is applied "to determine the effect of a change in the bed of the stream on the [state] boundary."

The Eighth Circuit did not discuss *Nebraska v. Iowa*, 406 U. S. 117, 31 L. Ed. 2d 733, 92 S. Ct. 1379 (1972) which the District Court found very significant on this point (App. C 4, 5). The District Court opinion says:

"Thus, under the 1972 *Nebraska v. Iowa* decision, Nebraska law would provide the rule of decision for land disputes as to river changes occurring prior to 1943, and Iowa law would provide the rule of decision for changes occurring after that date."⁶

Neither the Compact⁷ nor the Act of Congress⁸ approving it made any exception for Blackbird Bend or the Omaha Indian Reservation.

⁶ The statement refers to land on the Iowa side of the 1943 Compact boundary, Footnote 4 of the *Nebraska v. Iowa* opinion, *supra*, mistakenly lists Blackbird Bend as an area formed since 1943. Since it was actually formed before 1943, Judge Bogue concluded that *Nebraska v. Iowa, supra*, construed the Compact to make Nebraska law the rule of decision for Blackbird Bend.

⁷ Iowa Code 1977, p. LXXIV; Iowa Acts 1943, C 306; Nebraska Laws 1943, C 130, R. R. S. Nebr. 1943, Vol. 2A, Appendix p. 915.

⁸ Act of July 12, 1943, 57 Stat. 494.

(2) The special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated do not justify applying federal common law of accretion and avulsion in this case.

In his opinion (App. C at p. 5), the district judge concluded that "the fact that the United States, as trustee for the Tribe, claims the land involved in this lawsuit does not make federal law controlling," citing *Mason v. United States*, 260 U. S. 545, 43 S. Ct. 200 (1923); *United States v. Little Lake Misere Land Company, Inc.*, 412 U. S. 580, 595, 93 S. Ct. 2389, 2398 (1973); *Wright*, 14 *Federal Practice and Procedure*, 141 N. 4 (1976); *Fontenelle v. Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb. 1969), aff'd 430 F. 2d 143 (8th Cir. 1970); *Herron v. Choctaw and Chickasaw Nations*, 228 F. 2d 830 (10th Cir. 1956); *Francis v. Francis*, 203 U. S. 233, 27 S. Ct. 129 (1906); and Rules of Decision Act, 25 U. S. C. § 1652.

The district judge pointed out that while it may be that the commerce clause would empower Congress to mandate the use of federal law in cases such as this, it has not done so; that nothing in the treaties which relate to the Omaha Tribe, or the "Documents of Selection" (T. Ex. 7, R12, 13, A.265), under which the Omaha Tribe selected its reservation lands, precludes the application of state law; that only the restraints against alienation familiar to Indian law create an exception to the general rule that state law controls the tenure, transfer, control and disposition of real property, citing *Sunderland v. United States*, 266 U. S. 226, 45 S. Ct. 64 (1924). The district judge concluded (App. C8):

This Court is unable to discern any federal policy broad or strong enough to supplant the strong local policy concerning title to land. This case should be governed by state law. Virtually all of the analogous cases have used state law. In short, this case should be governed by the choice of law principles laid down in *Nebraska v. Iowa*, 406 U. S. 117, 92 S. Ct. 1379 (1972).

The Eighth Circuit disagreed. It held that "because the Tribe's right asserted to Indian trust land arises under federal law, we hold that the governing law is federal law" (App. A20).

We submit that the rule established by the decisions of this Court is that the general rule that state law controls the determination of the incidents of ownership of real property will be applied "in the absence of any governing administrative ruling, statute, or dominating consideration of congressional policy to the contrary." *United States v. Oklahoma Gas & Electric Company*, 318 U. S. 206, 87 L. Ed. 716, 63 S. Ct. 534 (1943). That case involved the validity of a license to maintain electric power lines over allotted Indian lands. The United States argued that the license was invalid. The Court said "the interpretation suggested by the government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the over-reaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule as are others in this State. . . ." Thus, the Court recognized the policy of Congress to protect Indians "against their own improvidence or the over-reaching of others" but found that policy not in conflict with the application of state law under the circumstances

of the case, pointing out that the state law is not discriminatory.

Likewise, in the case at bar, the state law of accretion and avulsion applies equally to Indians and tribes and to all others, and it is not involved with any rule to protect Indians or Indian tribes from their own improvidence or the overreaching of others.

Unlike the case at bar, *Sunderland v. United States*, 266 U. S. 226, 69 L. Ed. 259, 45 S. Ct. 64 (1924), and *Oneida Indian Nation v. County of Oneida*, 414 U. S. 685, 39 L. Ed. 2d 90, 94 S. Ct. 771 (1974), were directly involved with the validity of the restrictions on alienation of Indian trust land. The Court in *Sunderland*, as reasons for enforcing the federal statutory restrictions on alienation of Indian land said (266 U. S. 233, 234):

Such power [restraint on alienation] rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal government to safeguard their interests and protect them against the greed of others and their own improvidence.

The basis for the *Sunderland* decision does not exist in the present case. No federal statute or federal policy designed to give Indian tribes preferential treatment by way of protecting tribal land from the ravages of the Missouri River exists. Thomas Ashley in the Fall of 1908 reported to the Commissioner of Indian Affairs that the river, where it turned to the east at the north end of Blackbird Bend had in the previous year migrated south about a mile (W. Ex. R, R. 535, 592), and that it had washed away over 400 acres of reservation bottom land, and that at the rate it was going, it would wash away an

additional 1,300 acres of allotted lands before the year 1914. He asked "if there is not some way to prevent this erosion by constructing riprap in the river above where it strikes this low land." He got no action from the Government. There was no policy to thwart the movements of the Missouri. The policy to protect Indians from fraud and over-reaching is not pertinent here since no transaction which would involve fraud or overreaching is involved.

The Eighth Circuit said (App. A17): "Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under the federal law." The right of the Iowa riparian landowners to their original land also arises under federal law which authorized the patents to them. The incidents of their ownership, including the right to accretion and the risk of loss by erosion are determined by state law. With that the Eighth Circuit agrees. But it thinks a different law should apply when an Indian tribe asserts a claim. We submit that the Eighth Circuit has furnished no valid reason for its rule.

The Court of Appeals seems to equate the destruction of Indian trust land by the Missouri River with its alienation by unauthorized conveyance by the tribe. The two actions are not comparable. When enacting the legislation providing for the restrictions on alienation, Congress did not have action by the Missouri River in mind. It did not say that no Indian trust land shall be washed away by the Missouri River without approval by treaty or act of Congress.

Where state law comes into direct conflict with federal policy, then federal law may be applied. *United States v. Little Lake Misere Land Co., Inc. et al.*, 412 U. S. 580,

37 L. Ed. 2d 187, 93 S. Ct. 2389 (1973). But even where the interest of the Federal Government may be directly opposed to application of state law, state law will be applied where the federal policy is an amorphous doctrine of national sovereignty, *United States v. Little Lake Misere Land Co., Inc. et al.*, *supra*, f. 10 at 412 U. S. 592, citing *United States v. Burnison*, 339 U. S. 87, 91 and 92, 94 L. Ed. 675, 70 S. Ct. 503 (1950), and *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192 (1877). *Burnison* and *Fox* upheld state statutes invalidating bequests and devises to the United States.

While the application of the Eighth Circuit's version of federal law is favorable to the tribe in this case, there is no indication that it would be favorable to the tribe in other claims the tribe might have. If the tribe claims other lands as accretion (instead of by avulsion as in the present case), state law would be more advantageous to the Tribe than the Eighth Circuit version of federal law. An illustration of such a situation is *Herron v. Choctaw and Chickasaw Nations*, 228 F.2d 830 (C. A. 10, 1956) where Oklahoma law which recognizes the doctrine of re-emergence, was applied, resulting in a judgment for the Indian tribe.

There is here no showing of significant conflict between federal policy and state law to justify application of federal law.

One reason why state real property law should be controlling is that application of state law will avoid the legal confusion sure to result if federal law and state law are permitted to reign in the same state, on the same river, in the same locality, simply because a federal interest is claimed by the United States.

Note this Court's recent decision in *California v. U. S.*, — U. S. —, 57 L. Ed. 2d 1018, 46 LW 4997 (July 3, 1978), which invoked the state's right to impose conditions on the appropriation of water for federal use. This Court recognized the "continued deference to state water law by Congress" [at p. 4999] and recognized that the federal policy was to avoid "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." [at p. 5003]. From a case involving real property law, we take a similar excerpt:

Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear. *United States v. Oklahoma Gas & Electric Co.*, 318 U. S. 206, 211, 87 L. Ed. 716, 721, 63 S. Ct. 534 (1943).

An illustration of such legal confusion exists in this present case. The United States in its complaint in No. C 75-4024 (A. 61, 62) asked for a decree quieting title in it as trustee for the Tribe of the Barrett Survey area (2900 acres) but excluding land which was "allotted to individual members of the Tribe and sold to non-members." The memo incorporated in the Tribe's complaint in C 75-4026 also disclaimed the land patented to non-Indians (A. 112). By discovery procedure and by evidence introduced at the trial, it was determined that the above excluded land was 400 acres, that an additional approximately 265 acres was unquestionably fee patented, a total of 665 acres, and that an additional approximately

80 acres was fee patented under deeds of questionable validity. Counsel and the representative of the B. I. A. who testified at the trial, Mr. Corke, agreed that the fee patented lands were out of trust whether or not they had been sold to non-Indians (R. 94). See *Larkin v. Paugh*, 276 U. S. 431 (1928), and, *Dillon v. Antler Land Co. Wyola*, 507 F. 2d 940 (C. A. 9, 1974), cert. den. 421 U. S. 922. A map was introduced showing the location of the fee patented lands (T. Ex. 18A, R94, 111). A map showing their location appears at the end of this brief.

With respect to the fee patented land the Eighth Circuit said (App. A67, footnote 70):

The government excepted from its complaint any claim to approximately 400 acres of land within the Barrett Survey which may have been allotted to individual Indians and subsequently patented to non-Indians. Any current claims to those lands by the Tribe might be affected by issues of adverse possession and laches. We therefore remand to the district court those claims related to the land excepted from the government's complaint for a determination on the above mentioned issues.

Also, the Eighth Circuit said (App. A66, 67): "The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment quieting title in the *trust lands* involved in this action in the United States as trustee, and the Omaha Indian Tribe" (emphasis ours). Quieting title only in the "trust lands" leaves out the fee patented lands, and under the Eighth Circuit ruling, we have a crazy quilt of applicable law, the Eighth Circuit version of federal law of accretion-avulsion to be applied in the area where the trust land was last seen on the Nebraska side of the river and the

state law in the area formerly occupied by the fee patented land, with the result, apparently intended by the Eighth Circuit, that the area of the fee patented land goes to the petitioners and the area of the trust land goes to the Tribe.

Apparently under the Eighth Circuit ruling, title to land claimed by the Tribe as accretion, not as part of the original reservation, would also be governed by state law (see footnote 69, C. A. Opinion, App. A.65). Since much of the 8000 acres involved in this litigation not yet tried is claimed by the Tribe as having been added to the reservation by accretion and then transferred to the east side of the river by avulsions, there would be a great deal of confusion in the trial over the 8000 acres trying to sort out to which tracts state and to which tracts federal law must be applied.

The policy of avoiding such legal confusion by applying the basic rule that the laws of the several states determine the ownership of the banks and shores of waterways should be continued.

CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be reversed with directions to reinstate and affirm the judgment and decree of the United States District Court for the Northern District of Iowa quieting title to the Barrett Survey area land in defendants as their respective interests may appear.

Petitioners should be awarded their costs herein incurred.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE
LAKIN, HAROLD JACKSON, DARRELL L., HAROLD,
HAROLD M. AND LUEA SORENSON,
Petitioners,

No. 78-161

STATE OF IOWA AND STATE CONSERVATION COMMISSION
OF THE STATE OF IOWA
Petitioners,

THE STATE OF INDIANA AND OTHERS; THE STATE OF
CALIFORNIA AND OTHERS; TITLE INSURANCE AND TRUST
COMPANY; PIONEER NATIONAL TITLE INSURANCE COM-
PANY; AND AMERICAN LAND TITLE ASSOCIATION, AMICI
CURIAE

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES
OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT OMAHA INDIAN TRIBE

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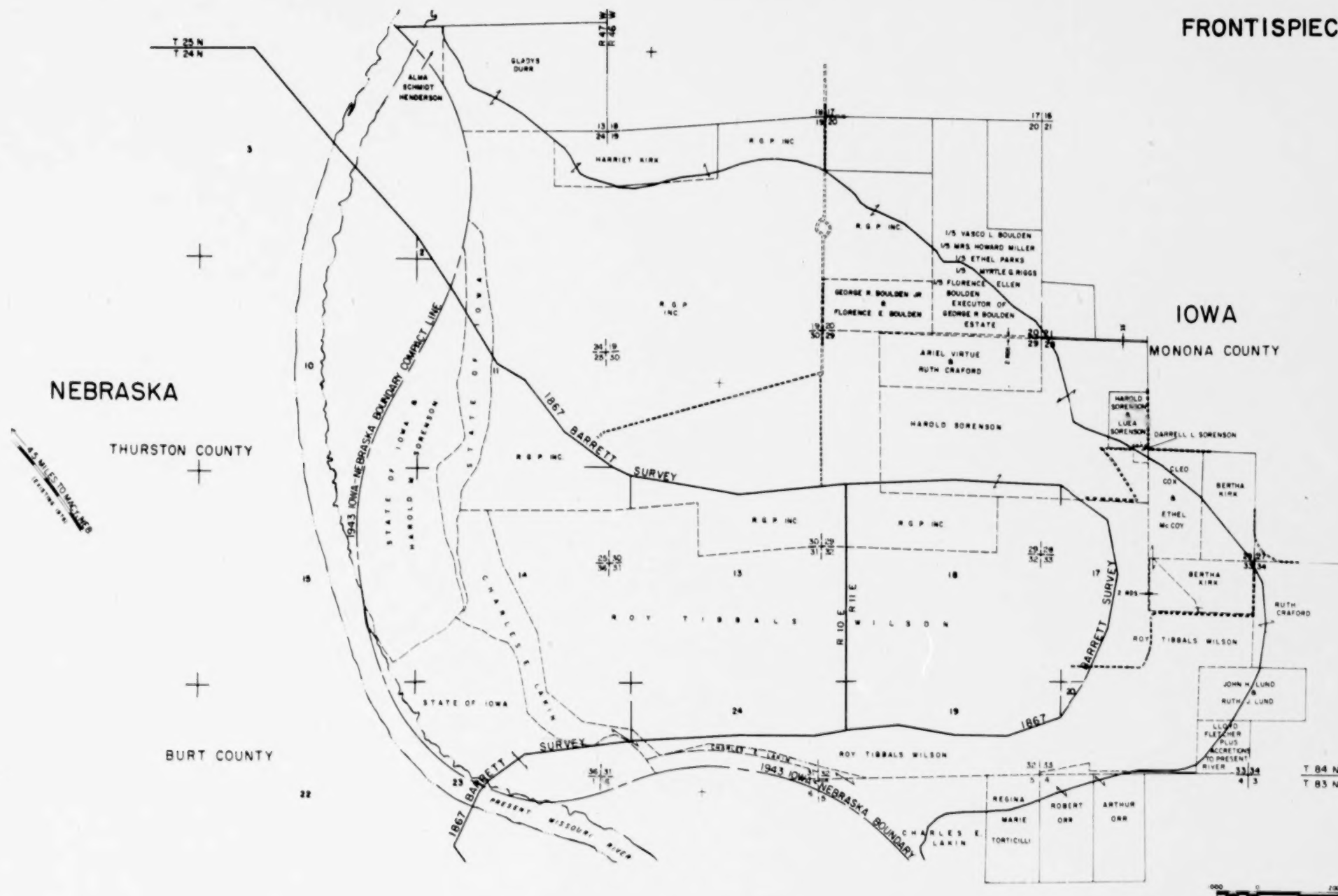
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NOTE: Please note that, whenever "Petitioners" is used, throughout the context of this Brief, it means all of Petitioners, unless otherwise stated.

Also, please note that, whenever "State of Iowa" is used, it means the State of Iowa and the State of Iowa Conservation Commission.

FRONTISPIECE



PORTION OF TRIBE'S EXHIBIT "78"

EXHIBIT

TRACT 1 BLACKBIRD BEND AREA
LAND OWNERSHIPS
COMPILED FROM
DEFENDANTS' ANSWERS
CASE C75-4067

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE
LAKIN, HAROLD JACKSON, DARRELL L., HAROLD,
HAROLD M. AND LUEA SORENSON,
Petitioners,

No. 78-161

STATE OF IOWA AND STATE CONSERVATION COMMISSION
OF THE STATE OF IOWA
Petitioners,

THE STATE OF INDIANA AND OTHERS; THE STATE OF
CALIFORNIA AND OTHERS; TITLE INSURANCE AND TRUST
COMPANY; PIONEER NATIONAL TITLE INSURANCE COM-
PANY; AND AMERICAN LAND TITLE ASSOCIATION, AMICI
CURIAE

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES
OF AMERICA,
Respondents.

BRIEF FOR RESPONDENT OMAHA INDIAN TRIBE

OPINIONS BELOW *

The Opinion of the Court of Appeals, *Omaha Indian Tribe v. Wilson, et al.*, is reported in 575 F.2d 620 (CA 8, 1978); rehearing and rehearing on *En Banc* denied. The trial court's Findings of Fact, Conclusions of Law and its Memorandum Opinion are reported in 433 F.Supp. 57, *et seq.* (U.S.D.C. N.D. W.D. 1976). The trial court's Preliminary Injunction, maintaining the Omaha Indian Tribe and the United States in possession is at Appendix, pp. 119, *et seq.*; trial court's Partial Summary Judgment in favor of the Tribe, Appendix, pp. 184, *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. Petitions for Rehearing were denied on May 28, 1978. The Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

25 U.S.C., § 22 of the Indian Non-Intercourse Act of 1834, is as follows:

“§ 194. Trial of right of property; burden or proof

“In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make

* Throughout, reference is made to Petitioners' Appendix for a Writ of Certiorari, which contains the Opinion of the Court of Appeals and the Findings of Fact, Conclusions of Law and Memorandum Opinion of the trial court, to which reference is made above. Those decisions are cited here as: App., A- or B- or C-. References to docket entries, pleadings and the record are made to: Appendix, with page numbers.

out a presumption of title in himself from the fact of previous possession or ownership.”

RULES OF THE SUPREME COURT

“Rule 40. Briefs—in general.

* * * *

“1(d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

“(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded save as the court, at its option, may notice a plain error not presented.”

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the trial court and declaring the findings of fact adopted by the trial court were “clearly erroneous” due to the failure of Petitioners, including the State of Iowa, in seeking to sustain their burdens of proof, supporting the affirmative defenses that they asserted, had offered extensive expert opinions, which were unsubstantiated, conjectural, speculative and without any factual foundation?

2. Whether the Court of Appeals erred in declaring that there must be adherence to Federal law where, as here, the question is “whether” title to 2900 acres of land passed out of the Omaha Indian Tribe, as asserted by Petitioners, including the State of Iowa, in their affirmative defenses, in which they alleged and sought to

prove that, although title to the 2900 acres originally resided with the Omaha Indian Tribe, those 2900 acres were totally "obliterated" by the Missouri River action and restored "under the sky" by accretions to the Iowa riparian lands?

3. Whether the Court of Appeals erred in applying 25 U.S.C. 194, which placed the burden upon Petitioners, including the State of Iowa, to prove that the 2900 acres, title to which is claimed by the Omaha Indian Tribe, were obliterated and replaced by action of the Missouri River with the result, as contended by Petitioners, including the State of Iowa, that title passed out of the Omaha Indian Tribe and to their predecessors in interest, a "squatter" on the lands claimed by the Tribe?

4. Whether the Court of Appeals erred in placing the burden of proof under 25 U.S.C. 194 upon Petitioners, including the State of Iowa, who, rather than deraigning their claimed titles from patents, as they aver, traced their title to "squatter" Kirk, who entered upon the lands claimed by the Omaha Indian Tribe thus initiating the claim asserted by Petitioners, including the State of Iowa, by trespass?

5. Whether Petitioner State of Iowa, under Rules of the Supreme Court, may, for the first time, raise the issue of ownership to the bed of the Missouri River and the islands in that River within the area in dispute, concerning which Iowa offered no evidence in the trial of the case, did not seek or obtain findings by the trial court on the subject, and made no reference to the ownership of the bed of the stream or to islands in the Missouri River when the matter was before the Court of Appeals but relied solely upon the claim to title by quit claim deeds from Petitioners who, like Iowa, deraigned their titles from "squatter" Kirk?

6. Whether Petitioner Iowa, having been granted a Writ of Certiorari in regard to this question:

"4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries"

has, nevertheless, refrained from mentioning that question throughout its Brief and, having offered no authority in support of it, has effectively abandoned that question in these proceedings before the Court?

7. Whether the Court of Appeals erred in reversing the trial court which, while refusing to apply Federal law to these cases, applied the laws of Nebraska, based upon facts allegedly in support of findings prepared by Petitioners and adopted verbatim by the trial court, which findings were declared by the Court of Appeals to be "clearly erroneous"?

STATEMENT OF FACT¹

Issue has been joined in these consolidated cases between the Omaha Indian Tribe and the United States of America, Respondents, with the Petitioners as to where title resides to 2900 acres of land now situated in the State of Iowa.

It is not denied by Petitioners that the United States and the Omaha Indian Tribe entered into the "Treaty with the Omahas, 1854."² Moreover, it is not denied

¹ Numerous inaccuracies and misstatements are contained in the Briefs of the Petitioners, necessitating a review of the basic facts by the Respondent Omaha Indian Tribe. For ownerships, see Frontispiece, Tr.'s Ex. 78, R. Vol. I, p. 23.

² March 16, 1854, 10 Stat. 1043. See, Kappler, *Indian Affairs and Treaties*, Vol. II, pp. 611, *et seq.* NOTE: By the Treaty with the Omahas, March 6, 1865 (14 Stat. 667), the Omaha Indian Tribe ceded "a tract of land from the north-side of their reservation," which was used by the United States to create the Winnebago Reservation, March 8, 1867 (14 Stat. 671). See Kappler, pp. 872-4. Pursuant to the 1854 Treaty with the Omahas, there was established "... the centre of the main channel of said Missouri River. ..." as the eastern boundary of the Omaha Indian Reservation. *In error*,

by Petitioners that 2900 acres, comprising the Blackbird Bend Oxbow, were once part of the Omaha Reservation, around which flowed the mainstream of the Missouri River.

Petitioners, while admitting the early history of what is referred to as the Blackbird Bend Oxbow, deny that the 2900 acres in question are the same lands which were part of the Omaha Indian Reservation. Rather, Petitioners assert the Blackbird Bend Oxbow was totally destroyed by the actions of the Missouri River and completely restored, in the Petitioners' words, "under the sky" by the new land created through the process of accretion to the Iowa riparian bank of the Missouri River.

Possession Of 2900 Acres Pursuant To Trial Court's Order

Respondents Omaha Indian Tribe and the United States of America, since April 2, 1975, have been and are in peaceful possession of the 2900 acres of land, which they

Petitioners Wilson, *et al.*, state that the "outside boundaries" of the Omaha Indian Reservation were first surveyed by Barnum. (Pet.'s Br., p. 43, note 5) That statement is incorrect. As the record discloses, Barnum surveyed the north, south and west boundaries. Barnum did not survey the east boundary, which would have entailed meandering the ordinary high water mark of the Missouri River. Most assuredly, Barnum did not meander the River and, most assuredly, his survey could not, in any sense, change the center of the River as the location of the eastern boundary of the Omaha Indian Reservation, all as reviewed above. In error, Petitioners Wilson, *et al.*, refer to the Opinion of the Solicitor of the Department of Interior to represent to the Court the fact that the Solicitor determined that the center of the River was not the eastern boundary of the Omaha Indian Reservation. It is most important that reference be made to this miscitation by Petitioners Wilson, *et al.* In the Appendix at p. 108, the correct boundary of the Omaha Indian Reservation is set forth. At the bottom of p. 108, top of p. 109, the correct boundary of the Winnebago Indian Reservation is set forth. See, in that connection, Kappler, Vol. II, p. 872. At Article 2 of the Treaty, it will be observed that the Winnebago Indian Reservation is described. To represent to the Court that the Omaha Indian Reservation is described in the same manner as the Winnebago Indian Reservation is a most serious misstatement.

contend is now and has always been the lands constituting the Blackbird Bend Oxbow.³ The trial court, Judge McManus presiding, in entering its Order of June 5, 1975, reviewed in some detail the status quo to be maintained between the Tribe and the Petitioners. On the subject, the trial court said this:

"The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land, and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years."⁴

Petitioner Lakin admitted not having paid taxes.⁵ The trial court continued with its rationale in regard to the possession and occupancy of the Blackbird Bend lands by the Tribe and the United States by making this statement: "Perhaps the true uncontested status was many years ago before the Missouri River changed its course."

Continuing its analysis and establishing the predicate for the Order of June 5, 1975, the trial court stated:

"But most significantly, the court views the present occupation by the Omaha Tribe, with the approval of the Tribal Council acting pursuant to its authority under 25 USC § 476, and with the assistance of the BIA acting in its capacity as an executive agency, constitutes the status quo to be preserved."⁶

³ That peaceful occupancy and possession of the Tribe and the United States is predicated upon an Order entered June 5, 1975, by the United States District Court in Sioux City, Iowa. See Appendix, pp. 119-126. Petitioners' recital respecting the Tribe's possession ignores the fact that the issue was fully reviewed by the trial court prior to the issuance of the April 5, 1975 Order. See Pet.'s Br., pp. 7-9.

⁴ See Appendix, p. 124.

⁵ *Ibid.*, at p. 234.

⁶ *Ibid.* [Emphasis added]

As the trial court recognized in its Order of June 5, 1975—as the facts in the record of these complex cases disclose—the status of the title to the Blackbird Bend Oxbow will be governed very largely, if not entirely, by the history of the movements of the Missouri River over a protracted period of time.

Resume Of The History Of the Blackbird Bend Oxbow

When the Lewis and Clark Expedition, in September of 1806, passed through the ancient homeland of the Omaha Indian Tribe, it mapped the Blackbird Bend Oxbow. Elmer M. Clark, an expert witness for the Omaha Indian Tribe, utilized present day topographical information in his studies of river morphology of the Missouri River and related it to the mapping by Lewis and Clark. It is significant that the Blackbird Bend Oxbow and other natural monuments, located and described by Lewis and Clark and other early explorers, constitute some of the more important facts developed by the Omaha Indian Tribe in support of the Tribe's claims.⁷

In 1852, the ordinary high water mark of the Missouri River, along the east or Iowa bank of that stream, was meandered by A. Anderson, a Deputy Surveyor for the General Land Office, Department of the Interior. That was the first official survey by the General Land Office that mapped the left or Iowa bank of the Missouri River, the outside curve of the River, in its course around the Blackbird Bend Oxbow.⁸

A determination of the location of the center of the navigable channel of the Missouri River in its course

⁷ See Tribe's Ex. 72; see, transcript, Vol. II, testimony of Elmer M. Clark, p. 180, lns. 10, *et seq.* (R. Vol. II, p. 187)

⁸ Tribe's Ex. 84, 1852 A. Anderson Survey; see testimony of Elmer M. Clark, Vol. II, p. 167, lns. 21-25; p. 203, lns. 3-18; testimony of Charles S. Robinson, Vol. VI, p. 804, ln. 14—p. 805, ln. 20; p. 924, lns. 19-23

around the Blackbird Bend Oxbow was made in 1856. That reconnaissance expedition was conducted by Lieutenant G. K. Warren, Topographical Survey Agency of the United States Army.⁹ Subsequently, in 1858, the "tie" of the Iowa and Nebraska cadastral surveys by the United States clearly delineated the Blackbird Bend Oxbow, around which the Missouri River made its course for so many years.¹⁰

Barrett Survey, Blackbird Bend Oxbow

During a period of extremely high water of the Missouri River in the months of April and May in the year 1867, T. H. Barrett, Deputy Surveyor, General Land Office, Department of Interior, undertook the first complete survey of the Omaha Indian Reservation.¹¹ As part of that survey, Barrett meandered the Missouri River at the high water mark in its course around the Blackbird Bend Oxbow. The plat prepared by Barrett of his meander of the Blackbird Bend Oxbow appears on Plate I, which immediately follows. The Barrett meander line encompasses the 2900 acres, title to which is the subject matter or res of these consolidated cases.

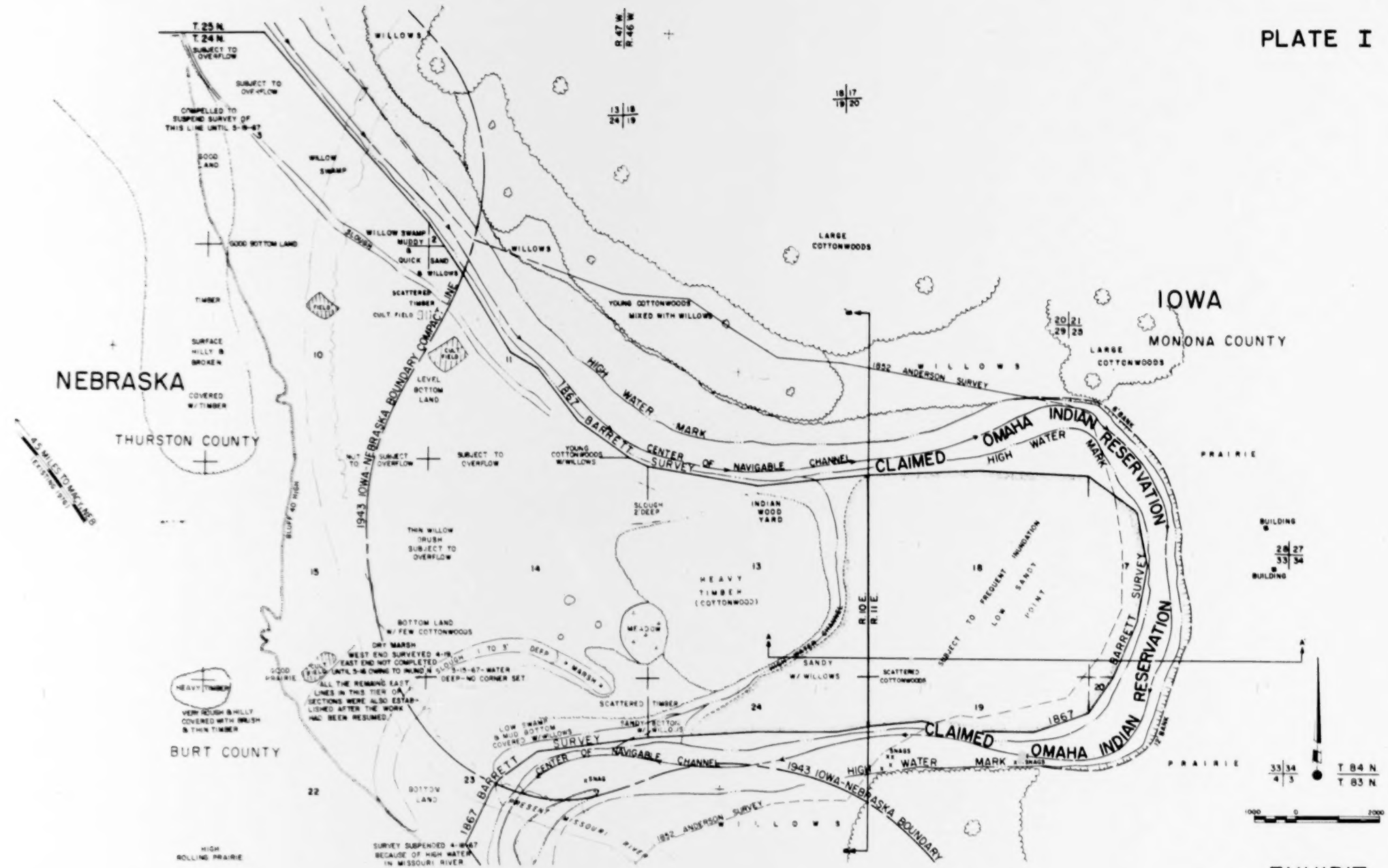
Barrett, in accordance with the rules and regulations of the Department of Interior, duly recorded observations of physical phenomena which pertained to the 2900 acres within the Blackbird Bend Oxbow. As depicted on Plate I, Barrett recorded in his field notes that a high water channel transected it at a point east of the common line between Ranges 10 and 11 West. This is what Barrett reported in his notes:

⁹ Tribe's Ex. 94; transcript, Vol. II, testimony of Elmer M. Clark, pp. 179, *et seq.*

¹⁰ Appendix, p. 205; Tribe's Ex. 23 & 94; transcript, Vol. II, testimony of Elmer M. Clark, pp. 181, *et seq.*

¹¹ See p. 5, note 2, *supra*. Tr.'s Ex. 95, R. Vol. VII, p. 904, ln. 1.

PLATE I



PORTION OF TRIBE'S EXHIBIT "95"

EXHIBIT
TRACT 1 BLACKBIRD BEND AREA
1867 T.H. BARRETT SURVEY (APRIL & MAY)
WITH
MISSOURI RIVER HIGH WATER MARK
AND
1867 NAVIGATION CHANNEL (JULY)
WITH
GEOLOGIC MAP

"Until very recently, appearances indicated that this point [Blackbird Bend Oxbow] was increasing in size from the deposits and drift of the river; but, during the present season, the river, rising to a great height, partly worked a channel across it, which may, eventually, entirely detach it from the Nebraska shore, rendering it an island in the river."¹²

Subsequently, reference will be made to the fact that Barrett's prediction that the Missouri River would transect a portion of the Blackbird Bend Oxbow was accurate.

Barrett's 1867 Allotment Survey

Barrett, in addition to meandering the Blackbird Bend Oxbow, established the legal subdivisions within the area in question. West of the common line, between Ranges 10 and 11 West, Barrett subdivided the sections of land into 80-acre allotments. As will be reviewed, the individual Omaha Indians entered upon those allotments and occupied them for a great many years.

The 1879 Survey Of The Blackbird Bend Oxbow

The Easterly High Bank is the furthest point to the east that the Missouri River eroded into the left or Iowa bank of the River. That easterly migration of the Missouri River around the Blackbird Bend Oxbow occurred not later than the year 1875. While the Missouri River was eroding the lands in the State of Iowa, it was adding by accretions to the Blackbird Bend Oxbow.¹³

¹² App. p. A53; 575 F.2d 645. R. Vol. I, p. 22, ln. 19. See Tr.'s Ex. 26e, p. 6; See Tr.'s Ex. 95; R. Vol. VII, p. 904, ln. 1.

¹³ App., p. A8; 575 F.2d 624. There is no disagreement as to the Tribe's description that:

"The Easterly High Bank is a natural monument demarking the furthest point of progression of the eastern migration of the

The Missouri River Commission, from June 16 to June 26, 1879, during a period of extremely high flow, made an intensive investigation of the Missouri River in its course around the Blackbird Bend Oxbow. There follows this page Plate II, which discloses the flood-stage of the Missouri River and the thalweg of the stream at that time.¹⁴ That exhibit establishes the course of the River after it had left what has been referred to as the Easterly High Bank. The evidence proves the sudden and abrupt departure of the Missouri River from the bed of its stream situated at the toe of the Easterly High Bank.¹⁵

Too great stress may not be placed upon the fact that, during the period of June 16 to June 26, 1879, the Missouri River was out of its banks. In the words of the court below, predicated upon the record, the Missouri River, during that period was “. . . almost 10,000 feet wide covering as much as two-thirds of the Barrett Survey. . . .”¹⁶ After the flood-stage, the Missouri River normally occupied a bed 800 feet in width.¹⁷ The Missouri River Commission, in its survey, discloses that “The thalweg had shifted from against the easterly high bank to a point nearly 6,000 feet to the west.”¹⁸ It is clear that the years 1875 and 1879, which were years

Missouri River from the eastern boundary of the 2900 acres, as surveyed by Barrett in 1867.

“It commences at a point on the Easterly High Bank located approximately 2,200 feet southwesterly from the corner common to Sections 20, 21, 28 and 29, T. 84 N., R. 46 W. of the 5th P.M., continuing down said Easterly High Bank a distance of approximately 3½ miles to a point on the Easterly High Bank approximately 4,900 feet northwesterly of the common corner of Sections 4, 5, 8 and 9, T. 83 N., R. 46 W. of the 5th P.M.

¹⁴ See Tribe's Ex. 29; R. Vol. III, p. 285, lns. 20-21.

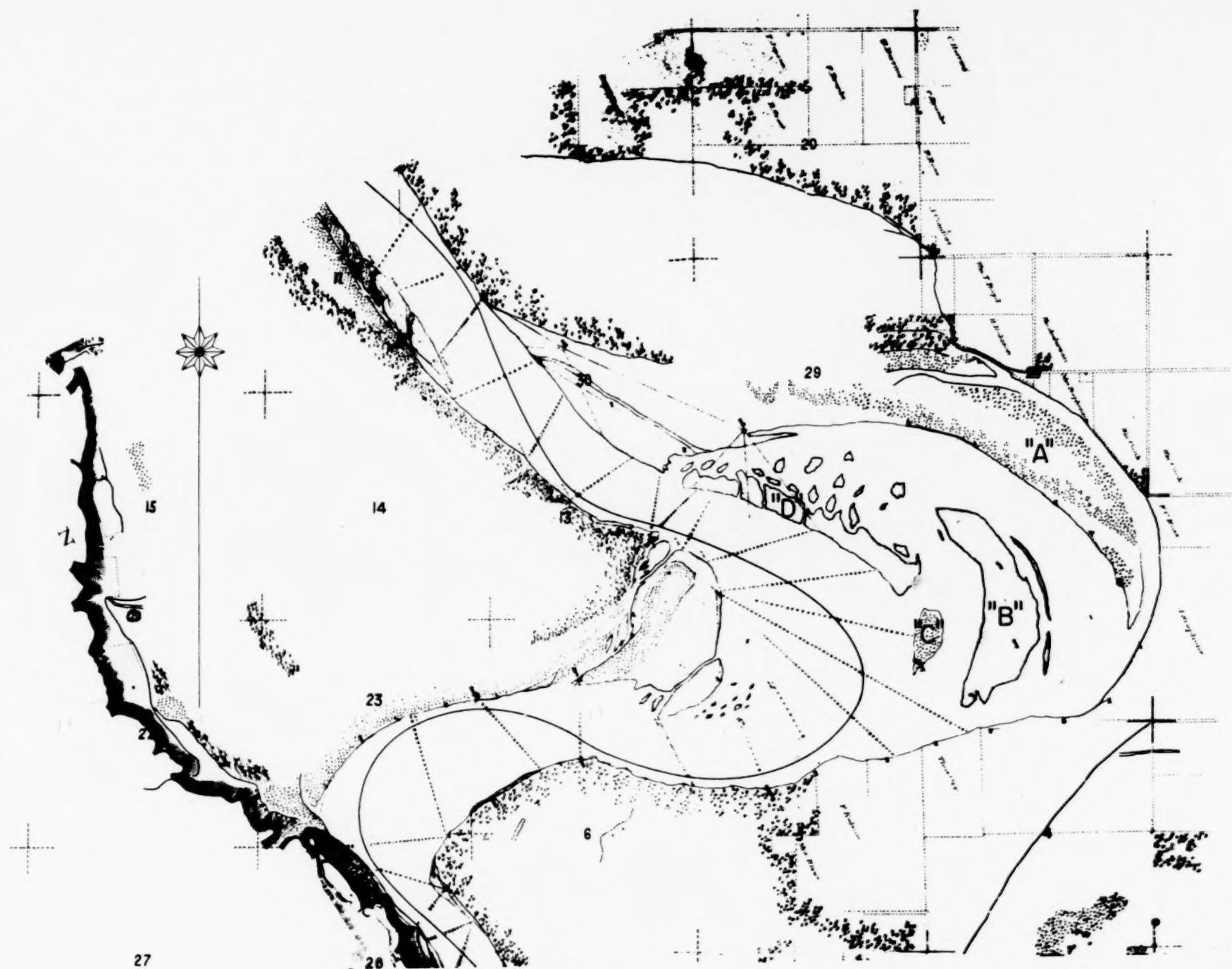
¹⁵ See p. 14, *infra*.

¹⁶ App. p. A8; 575 F.2d 624.

¹⁷ *Ibid*.

¹⁸ See pp. 11-12, note 13, *supra*.

PLATE II



EXHIBIT

PORTION OF TRIBE'S EXHIBIT "29"

1879 MISSOURI RIVER COMMISSION SURVEY

of extremely high flow, contributed to the Missouri River abruptly and suddenly and permanently abandoning its well-defined 1875 channel at the foot of the Iowa Easterly High Bank, all as predicted by U.S. Deputy Surveyor T. H. Barrett.¹⁹ Because the Missouri River abruptly abandoned its 1875 deeply incised channel, there were no accretions to the riparian Iowa bank of the Missouri River. Simply stated, the Missouri River did not deposit soil, sand and gravel along the Easterly High Bank, the constituents of accretions.²⁰ It must be stressed that the abandoned 1875 channel and the total absence of accretions to the Easterly High Bank constitutes phenomena that are present today, concerning which the witnesses for the Tribe testified at length, all as cited above.²¹ That evidence was introduced and effectively overcame any presumption of accretions that might have arisen under Iowa law, assuming the applicability of that law, which is denied.²²

¹⁹ See p. 11, *supra*, Barrett's prediction of the avulsion. See also testimony of Charles S. Robinson, Vol. VII, p. 925, lns. 9-24; Tribe's Ex. 96.

²⁰ Testimony of Charles S. Robinson, Vol. VIII, p. 1002, lns. 17-25. See Tribe's Ex. 101b. See also Hallberg, cross-examination, Vol. XIX, p. 2819, ln. 11—p. 2820, ln. 13. Tribe's Ex. 99.

²¹ See Pet.'s witness Hallberg, cross-examination, Vol. XIX, p. 2668, lns. 14-17; Wilson's Ex. V-8 and testimony of Government's witness, Vol. XIII, p. 1722, ln. 22—p. 1723, ln. 17. See Government's Ex. 151, which is Wilson's Ex. V-8.

²² Tribe's evidence, proving that there were no accretions to the Easterly High Bank, effectively overcomes the presumption of accretion, to which reference has been made. See, in that connection, App., p. A24, note 22; 575 F.2d 632-33.

Under the Federal Rules of Evidence, "a presumption loses its vitality once sufficient evidence on a disputed issue has been presented to permit a fact finder to act upon it (citations omitted). The Tribe having presented substantial conflicting evidence on the

In error, Petitioners, relative to the Missouri River movement during the June 1879 mapping by the Missouri River Commission, said this:

"By 1879 when the Missouri River Commission mapped the Missouri in this area . . . the eastern mile of the south side and two miles of the north side of Barrett's meander lobe had disappeared, and the thalweg of the river was running through that area."²³

That statement is belied by the 1879 map, Plate II, and the comments which follow. Throughout, Petitioners confuse the fact that the Missouri River historically overtopped its banks during flood periods and receded without affecting the inundated lands.

1884 Allotments Assigned To Omaha Indian Members And Their Occupancy Of The Blackbird Bend Oxbow

Disproving the last quoted statement by Petitioners, these facts are most relevant: In 1884 and again in 1900, individual Omaha Indians were assigned allotments on the Blackbird Bend Oxbow.²⁴ The allotments, which were

issue of accretion, any presumption of accretion disappeared and had no further effect on their case."

An Anomaly: The trial court—Judge Bogue presiding—applied the laws of Nebraska to these cases. In the last cited footnote, the court below reviewed and commented upon the laws of Iowa and Nebraska. It points out that there was a common law presumption in favor of a finding of accretion. The anomaly is this: The trial court applied Nebraska law and, as the court below points out "No such presumption [in favor of accretions] exists under Nebraska law." See App., p. A24, note 22; 575 F.2d 632-33; see App., pp. C2, *et seq.*

²³ Pet.'s Br., p. 14.

²⁴ Testimony of Charles P. Corke, transcript, Vol. I, p. 86; see Tribe's Ex. 80. NOTE: The map attached to the Brief of Petitioners Wilson, *et al.*, is purely fabricated. Statements set forth in what

occupied by the individual Omaha Indians were made available to them pursuant to regulations established by the Secretary of Interior. Comment has already been made that the allotments were surveyed by Barrett in 1867.

From 1884 into the 1920s, lands in the Blackbird Bend Area were occupied and farmed by individual members of the Omaha Indian Tribe. The erroneous character of the last quoted excerpt from Petitioners' Brief is underscored by the occupancy of the Omaha Indians of the Blackbird Bend Area, which Petitioners, in error, allege was largely washed away, all as reviewed.²⁵

Blackbird Bend Oxbow From 1890 to 1923

A momentarily stabilized Missouri River is depicted by the Missouri River Commission Map of 1890,²⁶ which is Plate III, following this page. Large areas of accretion to the north and east of the Barrett line are set forth on that map.²⁷ The center of the navigable channel is well to the north and east of the common line between Ranges 10 and 11 West, which intersect the Blackbird Bend Oxbow.

During the 1890 to 1912 period, the Missouri River moved to the north and east. Throughout that period,

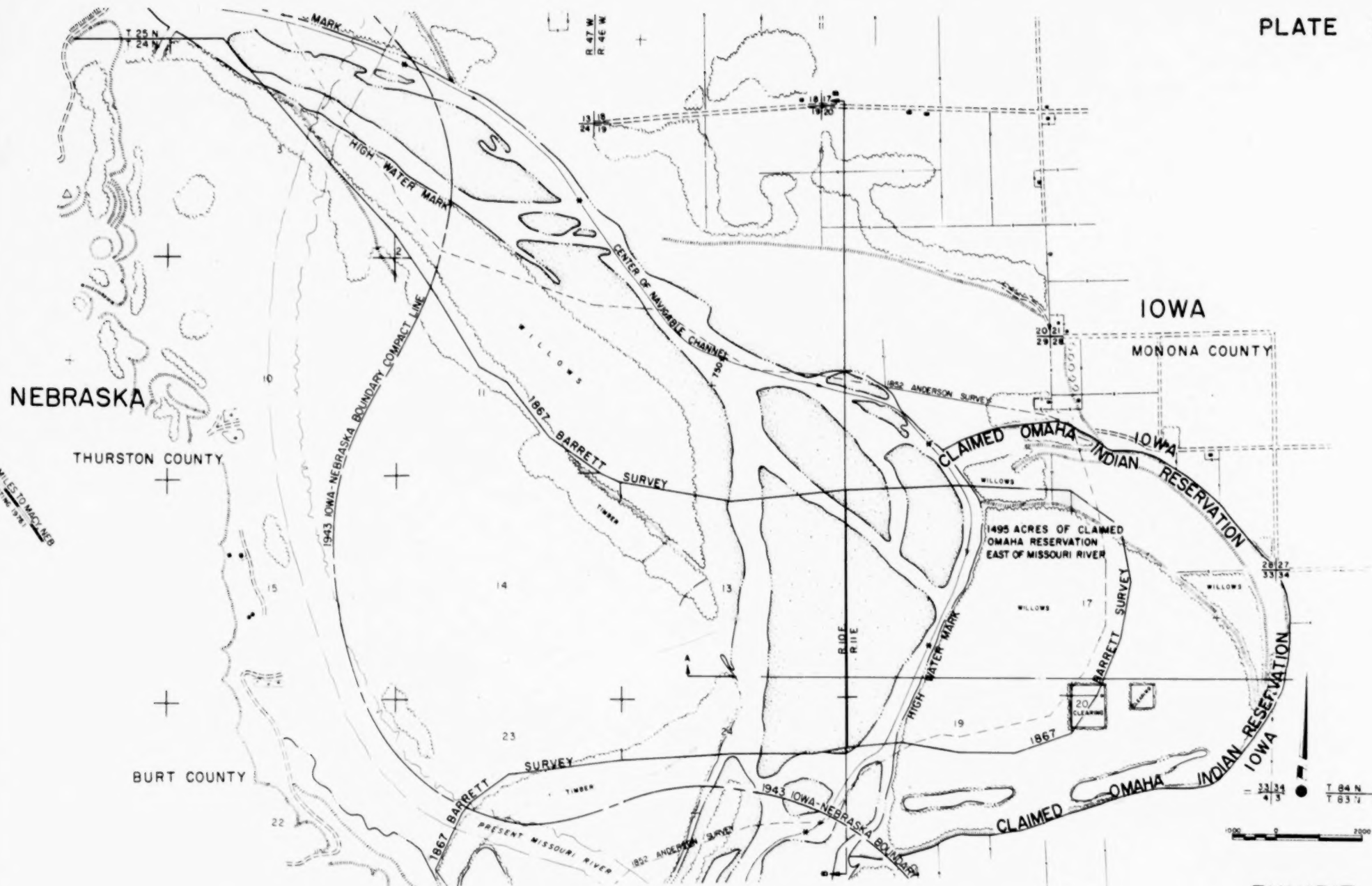
purports to be a legend are clearly in error and are not supported by the evidence. Under normal circumstances, it would be appropriate for the Tribe to move to strike that fabricated map. It will suffice to bring to the Court's attention that the map, as tendered, is in no sense any part of the evidence in these consolidated cases. It does prove, of course, that the lands were occupied for a long period of time by Omaha Indians. However, the references to fee patents and related data should be ignored because they are contrary to the facts in the record.

²⁵ See Petitioners' quoted statement cited at p. 15, note 23, *supra*.

²⁶ See Tribe's Ex. 101. R. Vol. VIII, p. 1024, ln. 4.

²⁷ See Plate III, p. 17, *infra*.

PLATE III



EXHIBIT

TRACT 1, BLACKBIRD BEND AREA

1890 MISSOURI RIVER HIGH WATER MARK

AND

GEOLOGIC MAP

WITH NAVIGATION CHANNEL

PORTION OF TRIBE'S EXHIBIT "101"

C S ROBINSON & ASSOCIATES
GOLDEN, COLORADOE M CLARK & ASSOCIATES
DENVER, COLORADO

accretions were being added to the Blackbird Bend Oxbow. That northerly and easterly migration of the Missouri River continued from 1890 until some brief time after 1912 and washed away for all times the lands surveyed in that area by Anderson in 1852.²⁸ Petitioners do not contest the fact that a large area of land accreted to the Blackbird Bend Oxbow when the Missouri River moved north and east.

The Missouri River, having moved to the Northerly High Bank, suddenly and abruptly left its deeply incised channel at the foot of that bank. On the subject, the Court of Appeals made this statement:

"First, it is clear that the thalweg had moved substantially in a relatively short period of time; perhaps as few as three years, but no more than 11 years."²⁹

²⁸ Tribe's Ex. 103; Defendant Wilson's Ex. Q-8. See testimony of Charles S. Robinson, Vol. XIII, p. 1008, lns. 1, *et seq.*; p. 1027, lns. 11-22; p. 1034, lns. 21-23; p. 1046, ln. 21—p. 1047, ln. 5; p. 1047, ln. 23—p. 1048, ln. 6. Testimony of Elmer M. Clark, Vol. IV, p. 448, lns. 12—p. 449, ln. 25.

²⁹ See Def. Wilson's Ex. Q-8, locating the Northerly High Bank, which has been described as follows: "a natural monument demarking the furthest migration northward of the Missouri River from the northern boundary of the 2900 acres as surveyed by Barrett in 1867...."

"The course of the Northerly High Bank is described as follows: The Iowa Northerly High Bank runs southeasterly through SE2 of Section 13, T. 84 N., R. 47 W. and continuing through the NE4 of Section 24, T. 84 N., R. 47 W., then easterly through the NW4 and the N2NE4 of Section 19, T. 84 N., R. 46 W., thence southerly approximately 2,000 feet through the E2 NE4 of Section 29, T. 84 N., R. 46 W., terminating at the point of intersection of the Iowa Easterly High Bank. . . ."

See also App., p. A56; 575 F.2d 646, where the court says: "After 1890 the river moved in a northerly and easterly direction to a position shown as the northerly high bank in approximately 1912."

The Tribe offered comprehensive evidence on the subject.³⁰ The Tribe's intensive geologic and soil investigation, along the entire length of the abandoned channel at the foot of the Northerly High Bank, proved this fact: There were no accretions to the riparian lands along that bank.³¹

The assertions by the Tribe and the United States that the Blackbird Bend Oxbow was not washed away and replaced with other lands, as Petitioners contend, is fully supported by the evidence. Every map in the record of these consolidated cases locates and defines the Blackbird Bend Oxbow as surveyed by Barrett in 1867. The Plates made a part of this Brief were part of the Tribe's exhibits in these cases.

In regard to the movement of the River, after 1912, reference is again made to Plate I,³² the Barrett Survey of 1867. It will be observed along the western extremity of the Blackbird Bend Oxbow that Barrett mapped the low areas. Those areas were old channels of the Missouri River. There is strong evidence that when the Missouri River abruptly and suddenly abandoned its 1912 channel at the foot of the Northerly High Bank, it reoccupied one or more of those old channels.

The United States Corps of Engineers published a map of the area in 1923. From that map, it will be observed that the course of the Missouri River and the thalweg of that stream had drastically changed. That comparison can be accomplished by viewing the 1890 River location on Plate III with the 1923 River, which

³⁰ Appendix, pp. 208, *et seq.*, testimony of Elmer Clark relative to the absence of accretions to the Northerly High Bank.

³¹ Appendix, pp. 219-220, testimony of Dr. Charles S. Robinson; see also Tribe's Ex. 103d, based on soils and geologic testing, proving that no accretions attached to the Northerly High Bank.

³² Tribe's Ex. 95. R. Vol. IV, p. 904. See Vol. XXI, p. 3128, lns. 22-24; p. 3129, ln. 6; p. 3130, lns. 8-11. See, testimony of Dr. Charles S. Robinson, Vol. XXI, p. 3198, lns. 12-17; p. 3198, ln. 24—p. 3199, ln. 5.

appears on Plate IV, which immediately follows.³³ One of the great obstacles to Petitioners Wilson, *et al.*, who had by affirmative defenses asserted the destruction of the Blackbird Bend Oxbow and the replacement of it by accretions from the Northerly and Easterly High Banks, is the facts disclosed on the 1923 map. It will be observed on Plate IV that the Blackbird Bend Oxbow, far from being destroyed, was very much in place. It was not at that time nor was it previously destroyed, all as asserted by the Petitioners Wilson, *et al.*, in their affirmative defenses, concerning which they had the obligation to prove, all as will be reviewed.

In 1927,³⁴ the United States Corps of Engineers published another map of the Blackbird Bend Area. It will be observed that the Missouri River was braided and that Blackbird Bend lands remained in place. Equally important, moreover, is the fact that northeasterly and to the east of the Barrett Survey were substantial areas of accretion to the Barrett survey lands—not to the Iowa lands—all as set forth on Plates III, above, and IV and V, which follow.

Stability Of The Blackbird Bend Oxbow— A Most Crucial Fact

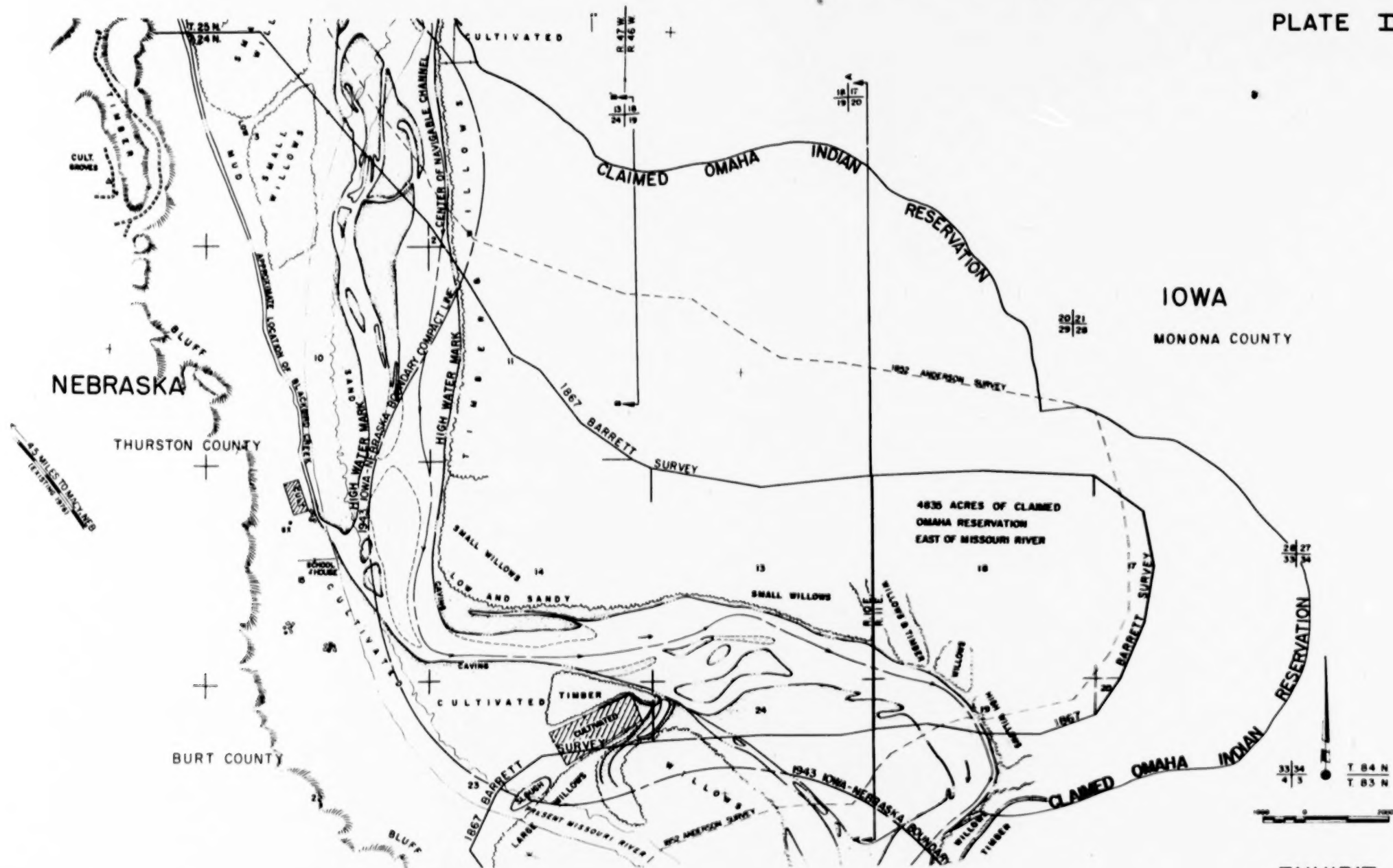
In error, Petitioners Wilson, *et al.*, assert that the Tribe and the United States claim that “. . . this 2900 acres [the Blackbird Bend Oxbow] came into existence on the east side as the result of avulsive actions of the River.”³⁵ Again, in error, Petitioners state that the

³³ Tr.'s Ex. 105, R. Vol. III, pp. 344-46. See Vol. IV, p. 550, lns. 10-21; p. 551, lns. 8-19; Vol. V, p. 641, ln. 2—p. 642, ln. 8; p. 642, ln. 16—p. 644, ln. 18; p. 645, ln. 8—p. 647, ln. 5; p. 651, ln. 25—p. 652, ln. 17; Vol. X, p. 1323, ln. 2—p. 1324, ln. 7. Dr. Charles Robinson, Vol. VIII, p. 1060, ln. 15—p. 1061, ln. 4; p. 1066, ln. 19—p. 1067, ln. 13.

³⁴ Tr.'s Ex. 106, R. Vol. IV, p. 436, ln. 24.

³⁵ Petitioner Wilson's Brief, p. 4.

PLATE IV

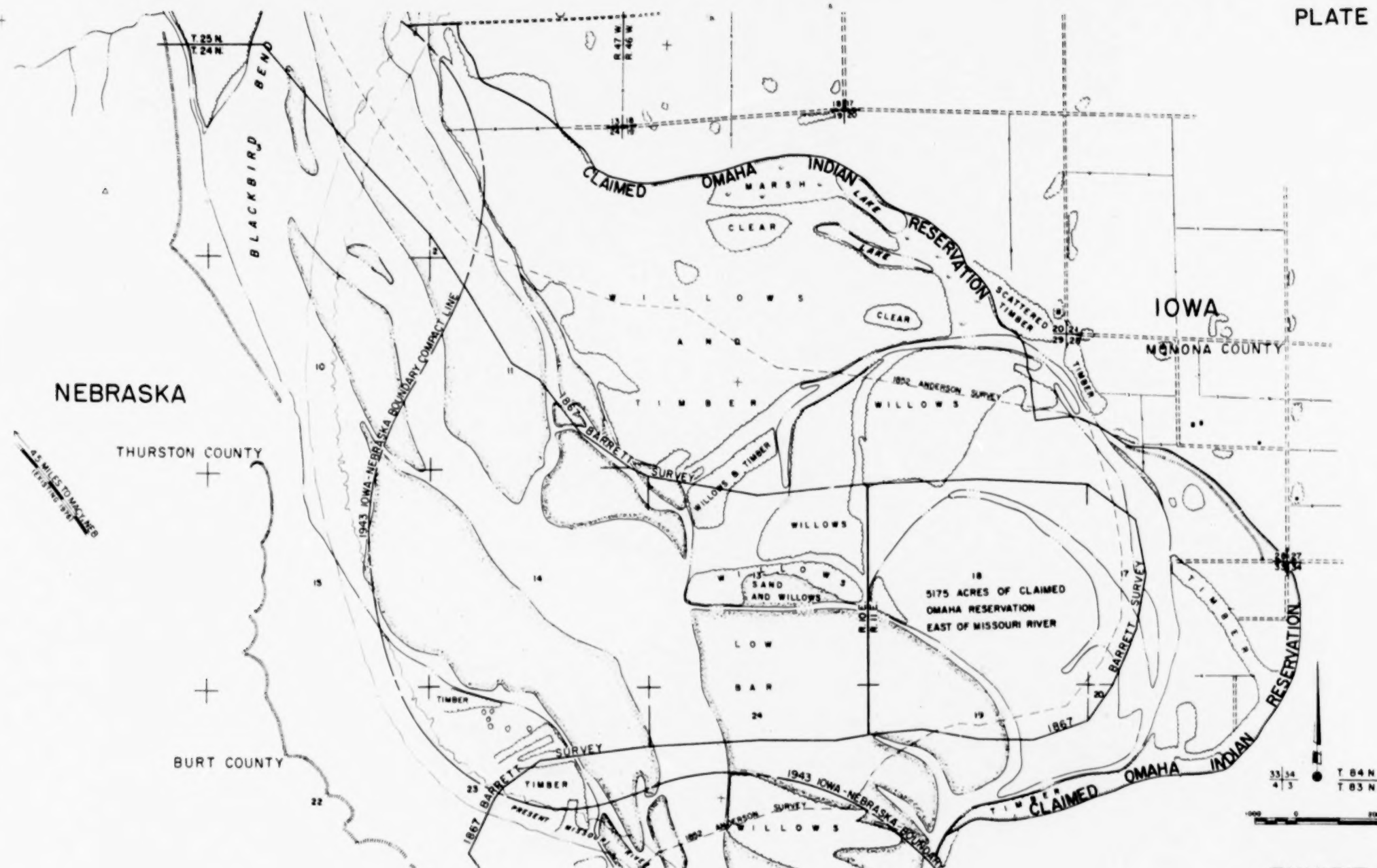


EXHIBIT

TRACT 1 BLACKBIRD BEND AREA

1923 MISSOURI RIVER HIGH WATER MARK
(SEPTEMBER)AND
GEOLOGIC MAP

PORTION OF TRIBE'S EXHIBIT "105"



EXHIBIT

TRACT 1 BLACKBIRD BEND AREA

1927 MISSOURI RIVER HIGH WATER MARK
(JANUARY)

PORTION OF TRIBE'S EXHIBIT "106"

eastern end of the "Barrett Survey area disappeared from the Nebraska side and appeared on the Iowa side" and that the Tribe and the United States contend that "Essentially all of the rest [the Blackbird Bend Oxbow] appeared on the Iowa side of the River during the period of 1906 to 1927."³⁶ There is not a scintilla of accuracy in either statement.

A resumé has been set forth in substantiation of the remarkable stability of the lands comprising the Blackbird Bend Oxbow from the time of Lewis and Clark to Barrett and on through the 1927 period when the Missouri River cut an entirely new channel west of the Blackbird Bend Oxbow.

All of the evidence supports the fact that the Blackbird Bend Oxbow survived all of the violent vagaries of the Missouri River, as asserted by the Omaha Indian Tribe. In a state of nature, the rampaging Missouri River created meander lobes—oxbows—and destroyed them with short shrift. Hence, it becomes important to seek the explanation of the continued existence of the Blackbird Bend Oxbow down through many years.

Dr. Charles S. Robinson testified at length in regard to the elements that contributed to the continued existence of the Blackbird Bend Oxbow in the most destructive of all rivers.³⁷ As previously stated, the River, in its course

³⁶ *Ibid.*, at p. 5.

³⁷ Appendix, p. 213: "The river could not move southward because of the erosion resistant bank along the south limb of it [the Blackbird Bend Oxbow] and the force of the river has been—well, it's been directed farther and farther east. It's getting so that the river has to go around tighter and tighter bends as the bend extends itself to the east and the river then as a result, in part, started to erode along or about in the position of the previous—the high water channel, which had been shown on the 1856 Warren map and also as shown on the Exhibit 95, the 1867 Barrett Survey and the Macomb map."

around Blackbird Bend, was "approximately 800 feet" in width.³⁸ Dr. Robinson then testified with specificity as to the kind and type of soils that were resistant to erosion and which aided in the Blackbird Bend Oxbow surviving down through the years.³⁹ Recognition was taken by the court below of the physical phenomenon that caused the Blackbird Bend Oxbow to be maintained in the River for such an extended period of time:

"The evidence also demonstrated that the Iowa south bank of the Blackbird Bend area was composed of erosion resistant material which would have prevented the southerly movement of the meander bend and made a cut-off possible."⁴⁰

As pointed out by the court below, the presence of erosion-resistant material on the south bank of the course of the Missouri River around the Blackbird Bend Oxbow has been established scientifically as a reason for the continuity of the Blackbird Bend Oxbow. On the subject, this scientific statement has been made: "For a natural cut-off to develop, erosion on the down-stream bank of the lower arm of a bend [in the stream's course around the oxbow] must be slower than along the upper arm."⁴¹ Thus it is that the destruction of the Blackbird Bend Oxbow did not occur. Rather, during a period of high flow, all as presaged by the presence of a high water channel mapped by Barrett, the River simply cut through the Blackbird Bend Oxbow, leaving land both east and west of the Missouri River after the high flow of 1879.⁴²

³⁸ Appendix, p. 216.

³⁹ Testimony of Dr. Charles S. Robison, Vol. VII, p. 942, lns. 6-19.

⁴⁰ App., p. A54; 575 F.2d 645.

⁴¹ App., p. A52; 575 F.2d 644-45.

⁴² See p. 11, *supra*.

**"Squatter" Joseph A. Kirk Is Principal Source Of Title For
Petitioners Wilson, Lakin, Jackson (Wilson's Lessee)—
Not Patents As Asserted⁴³**

By its sudden, abrupt and drastic change resulting in its 1923 position, as shown on Plates IV and V above, the Missouri River had, while leaving it largely intact, severed all of the Blackbird Bend Oxbow together with accretions to it from the right or Nebraska shore of that River. Thus, a very substantial segment of the Omaha Indian Reservation was separated from the remainder of the Reservation by a totally wild and uncontrolled stream. There was no bridge across the Missouri River offering access to the Omaha Indians to the land. More than a quarter of a century passed from the change of the course of the River before access to the lands in question would be provided.⁴⁴

The Court, in its 1972 *Nebraska v. Iowa* Opinion, "refers to a project begun in the early 1930's by the United States Army Corps of Engineers to tame the river..." in the area of Blackbird Bend and elsewhere.⁴⁵ Later, the Corps of Engineers would reduce the Missouri River to a channelized, totally controlled stream. Those changes moved the stream farther west resulting in the Blackbird Bend Area becoming highly attractive for squatters, which gave rise to this litigation. It was that metamorphosis from a wild stream in the 1920s to the completely controlled stream of the present day which caused the trial court to make this statement in its Order of June 5, 1975: "Perhaps the true uncontested status was many years

⁴³ "Squatter" is defined as "one who settles on land without right or title." *Webster's Third New International Dictionary, Unabridged; Black's Law Dictionary, Revised, Fourth Edition.*

⁴⁴ Tribe's Ex. 44, R. Vol. III, p. 307, lns. 8-10, 1946-1947, no bridge to Blackbird. Bridge built in 1956.

⁴⁵ *Nebraska v. Iowa*, 406 U.S. 117, 119 (1972).

ago before the Missouri River changed its course.”⁴⁶ Petitioners Wilson, Lakin and Jackson (Wilson’s lessee), in error, make this statement:

“... Petitioners here. . . . claim the land as accretion to Iowa riparian land and their chains of title go back to patents from the Government to that riparian land. The exception is the State of Iowa which claims part of the land as accretions to Iowa’s portion of the bed of the River.”⁴⁷

There will now be reviewed the magnitude of the error in that statement by Petitioners.

Rather than deraigning their titles “back to patents,” Petitioners Wilson, Lakin and Jackson (Wilson’s lessee) can only trace their claims to a “squatter” on the Blackbird Bend lands named Joseph A. Kirk. He is the source of their title.⁴⁸ The basis for the Kirk claim is simply that he allegedly occupied the land for the Iowa statutory period for acquiring title by adverse possession.⁴⁹ Kirk did not hold title predicated upon patents to the lands in question. Kirk first appears in the chain of title (offered in evidence by Petitioners) on May 4, 1925, when he

⁴⁶ Appendix, p. 124.

⁴⁷ Pet.’s Br., p. 4.

⁴⁸ Petitioners Wilson, *et al.*, offered extensive testimony in regard to a large but undefined area “squatted” upon by Joseph A. Kirk. See Appendix, pp. 234 *et seq.*, and additional references from those sources in the transcript.

⁴⁹ See, in that connection, the trial court’s April 5, 1976 Order, in which the trial court granted the Tribe’s Motion for Partial Summary Judgment on the grounds that the affirmative defenses of State statutes of limitation, adverse possession and acquiescence are not available to Petitioners under the circumstances of these cases. On the subject, the court ruled: “As stated above, state statutes of limitations cannot effect adverse possession of lands held in trust by the United States for the benefit of Indian tribes. Similarly, state rules of laches, estoppel, or abandonment have no applicability to the title dispute in the instant action.” Appendix, April 5, 1976 Order, pp. 184, 188.

recorded a quit claim deed dated April 20, 1925. In 1929, Kirk quieted title in himself. In 1948, Kirk conveyed to Raymond G. Peterson who, by subsequent transfers and conveyances, vested title to part of the land Peterson had acquired in Petitioner Charles E. Lakin, who subsequently transferred most of his lands to Petitioner Roy Tibbals Wilson.⁵⁰ The Frontispiece locates the lands

⁵⁰ See Wilson’s Ex. W and R.G.P.’s invalid Exhibits X, Y, and Z, purporting to be abstracts of title disclosing title from “squatter” Joseph Kirk to Peterson, Wilson, Lakin, et al. (Wilson Ex. W; R.G.P. Ex. X, R. Vol. XIII, pp. 1788-89).

QUIT CLAIM DEED from H.A. and W. Evans to Joseph A. Kirk, April 20, 1925.

QUIET TITLE DECREE, Whitney v. Kirk, on Joseph A. Kirk, March 8, 1929. Neither the Omaha Indian Tribe nor the United States is named.

CONTRACT OF PURCHASE between Joseph A. Kirk and Henry K. and Raymond G. Peterson, January 2, 1948.

ASSIGNMENT from Henry K. and Raymond G. Peterson to Jack M. Pace and Harold R. Bookstrom, June 30, 1953, for one half interest in all the land described in Contract dated January 2, 1948.

CONTRACT between Jack M. Pace and Harold R. Bookstrom to Charles E. Lakin, May 6, 1959, for one half interest in all the land described in the Assignment dated June 30, 1953, and conveyances recorded in Book 72 at pages 217 and 223.

AGREEMENT to partition by Charles E. Lakin (Petitioner), Henry K. and Raymond G. Peterson, October 31, 1959.

QUIT CLAIM DEED from Henry K. and W. Peterson to Raymond G. Peterson, February 17, 1961.

QUIET TITLE DECREE, Charles E. Lakin (Petitioner) v. State of Iowa (Petitioner), Equity No. 17400, November 15, 1963. Neither the Omaha Indian Tribe nor the United States is named.

QUIT CLAIM DEED from Charles E. Lakin (Petitioner) to State of Iowa (Petitioner), May 24, 1965.

WARRANTY DEED from Charles E. Lakin (Petitioner) to Roy Tibbals Wilson (Petitioner), May 18, 1972.

Quite obviously, the Peterson title can rise no higher than the “squatter” title that he acquired from Joseph A. Kirk. Upon the death of Raymond G. Peterson, the heirs incorporated establishing an entity using the initials “R.G.P.,” which, of course, has reference to Peterson, grantee from Kirk and grantor to Lakin or to Lakin’s predecessor.

R.G.P., Inc., filed a Petition for Certiorari—No. 78-162. That Petition was not granted. Hence, R.G.P., Inc., is not before the Court.

claimed by the Petitioners. It is abundantly manifest that Petitioners Wilson, *et al.*, did not deraign their title from patents from the United States Government. Absence of patents in Petitioners' chain of title forced upon them their implausible affirmative defenses, which they did not and could not sustain with evidence at the trial on the merits. Under the circumstances, it is respectfully urged, that Petitioners' claim to title, based upon patents, is contrary to the evidence which clearly shows that Petitioners' source of title is "squatter" Kirk.

**Petitioner State Of Iowa Traces Its Title To
"Squatter" Joseph A. Kirk**

There was quoted above the statement that Iowa "claims part of the land as accretions to Iowa's portion of the bed of the River."⁵¹ Iowa did not offer evidence to prove any accretions to any portion of the bed of the Missouri River. Iowa's claimed title to the lands which are within the Barrett Survey line stems from a quit claim deed from Raymond G. Peterson and wife.⁵² A portion of the lands claimed by Iowa was conveyed to the State by Charles E. Lakin and wife. Hence, "squatter" Kirk is the source of Iowa's title, for, as stated, the sole source of Petitioner Lakin's title is Kirk.

In connection with the claims of the State of Iowa, reference is made to the questions set forth in its Petition for a Writ of Certiorari. Question "4," presented by the State of Iowa in its petition for the writ in question, reads as follows:

"4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."⁵³

⁵¹ See, p. 27, note 47, *supra*.

⁵² See, Appendix, p. 262.

⁵³ Petition for a Writ of Certiorari, filed by State of Iowa, No. 78-161, p. 3.

Response to that inquiry would necessarily involve an analysis of the title of "squatter" Joe Kirk. Further reference is made to the Brief filed by the State of Iowa, which does not seek to test the issue of whether Federal law could divest Iowa's apparent good title. Rather, the question now presented by the State of Iowa is:

"2. Whether the Court of Appeals' decision violates established principles of Federalism."⁵⁴

The Tribe is proceeding on the basis that the issue of Iowa's title is no longer before the Court.

**Petitioners' Harold M. Sorenson, Et Al., Claimed Title Before
The Court Is Not Deraigned From Patents⁵⁵**

Petitioner Sorenson is claiming a substantial acreage in the western extremity of the Blackbird Bend, which was surveyed by Barrett. It is worthy of note that some of the lands claimed by Iowa and Sorenson were, until very recently, leased by Petitioner Sorenson from Respondent Omaha Indian Tribe.⁵⁶ It is likewise of interest, in regard to the particular land to which reference is here being made, that Sorenson is contesting with the State of Iowa relative to those lands. As noted above, the State of Iowa deraigns its title from "squatter" Joe Kirk.⁵⁷ It is the position of the Tribe that neither the claims of Iowa nor Sorenson has any validity. Most assuredly, the title of Iowa cannot rise any higher than that deraigned from Joe Kirk. If Sorenson's claim is on the basis of adverse possession, it is manifest that such

⁵⁴ Petitioners' Brief on the Merits, filed by State of Iowa, No. 78-161, p. 4.

⁵⁵ All of Petitioner Sorenson references in this Brief refer to Harold Sorenson for he is the party claimant.

⁵⁶ See Sorenson's Exhibit U-5.

⁵⁷ See Frontispiece, portion of Tribe's Ex. 78, Exhibit: Tract I, Blackbird Bend Area, Landownerships compiled from Defendants' Answers, Case C75-4067.

a claim has no standing as against the Omaha Indian Tribe and the National Government, which claims are predicated upon the Treaty of 1854.⁵⁸

In the extreme northeastern portion of the Blackbird Bend Area, surveyed by Barrett in 1867, is a parcel of land claimed by Petitioners Harold Sorenson, *et al.*⁵⁹ Petitioner Sorenson's claim to that property is unclear. That it is not predicated upon patent is too clear for question. From an examination of the record, it is possible that Sorenson's claim is based upon an Affidavit of Possession, at least in part.⁶⁰

Petitioners Assert Affirmative Defenses That The Blackbird Bend Oxbow Was Washed Away And Replaced By Accretions; Counterclaim For Quiet Title Decree Against The Omaha Indian Tribe

The inceptive action, in these consolidated cases, was initiated by Petitioner Harold Jackson, a "white person," against Edward L. Cline, an individual Omaha "Indian." That action was an injunction proceeding in the District Court of Iowa in and for Monona County, *Harold Jackson, et al. v. Edward L. Cline, et al., Defendants*, Equity No. 8965.

On May 16, 1975, the Monona County Court granted the request of Petitioner Jackson, a "white person," and ordered the issuance of a Writ of Injunction prayed for by Petitioner Jackson against Edward L. Cline. As an individual Omaha Indian, Mr. Cline was enjoined and restrained from occupying the Blackbird Bend Area encompassed within the Barrett Survey of 1867.⁶¹

⁵⁸ See note 50, p. 27, *supra*. See note 49, p. 26, *supra*.

⁵⁹ See note 57, p. 29, *supra*.

⁶⁰ Exhibit H-7, copy of "Affidavit of Possession, signed by Harold M. Sorenson, regarding Section 29 lands."

⁶¹ Appendix, pp. 117-118.

On May 20, 1975, the Omaha Indian Tribe petitioned the Federal District Court in Sioux City, Iowa, for an injunction against Petitioner Jackson to restrain him from interfering with the Tribe's occupancy of the 2900 acres here involved and to restrain him from having enforced the Order against Edward L. Cline, an individual Indian.

The Tribe likewise petitioned the Federal District Court in the same action "For A Stay Of State Court Proceedings . . ." against individual Omaha Indian Edward L. Cline and others.⁶²

On June 5, 1975, the trial court granted the Tribe's request; stayed the proceedings in the Monona County Court; and restrained Jackson and others from interfering with the occupancy by the Omaha Indian Tribe and its members of the 2900 acres constituting the Blackbird Bend Oxbow, as surveyed by Barrett in 1867.⁶³

When Petitioner Jackson answered the Tribe's complaint for an injunction against him, he defended on several grounds, among them being that the Blackbird Bend lands, occupied by Edward L. Cline, individual Omaha Indian, and others and the Tribe, had "been totally destroyed by the Missouri River."⁶⁴

On August 26, 1975, Petitioners Wilson and Lakin filed their answer in intervention on behalf of Petitioner Jackson in the cases initiated by the Tribe against him.⁶⁵ In that answer, Petitioners Wilson and Lakin admit the allegations made by the Omaha Indian Tribe in its case against Petitioner Jackson that the Omaha Indian Reservation was created in 1854 and that

⁶² Appendix, p. 100, C 75-4026, *Omaha v. Jackson*, U.S.D.C. N.D., W.D., Iowa.

⁶³ Appendix, pp. 119-126, pp. 125-126.

⁶⁴ Appendix, p. 127.

⁶⁵ *Ibid.*, at pp. 131, *et seq.*

"... in April and May of 1867 [Barrett surveyed] land which could be described [in the Tribe's complaint, which] ... existed, not in Monona County, Iowa, but within the borders of the state of Nebraska on the right or Nebraska bank of the Missouri River."⁶⁶

Continuing, Petitioners Wilson and Lakin averred against the Omaha Indian Tribe as follows:

"All of said land east of said Iowa-Nebraska Compact Line between the years 1867 and 1943

was eroded away by the action of the Missouri River and ceased to exist at the described location, having been washed down the river."

Additionally, Petitioners Wilson and Lakin declared that new land was created between 1867 and 1943

"... by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described [by the Omaha Indian Tribe in its complaint against Petitioner Jackson]. . . ."⁶⁷

In the Brief before the Court, Petitioners reiterate the affirmative defenses interposed against the Omaha Indian Tribe asserting that Blackbird Bend had been completely washed away and completely replaced. That there is no merit to those assertions is evidenced from the review of the facts set forth in the previous parts of this Brief.⁶⁸

The Omaha Indian Tribe, on October 6, 1975, filed its complaint to quiet its title to the entire Blackbird Bend Area, which completely encloses three sides—north-east-south—and includes the 2900 acres surveyed in 1867 by Barrett.⁶⁹

⁶⁶ *Ibid.*, at p. 132.

⁶⁷ *Ibid.*, at pp. 132-133.

⁶⁸ See, Plates I-V, *supra*; see p. 20, *supra*, *Stability Of The Blackbird Bend Oxbow—A Most Crucial Fact*.

⁶⁹ Appendix, pp. 139, *et seq.* See Appendix, Plate C of Complaint, p. 149. The base for the Frontispiece is predicated upon the Barrett

Responding by way of Answer and Counterclaim to the Tribe's October 6, 1975 Complaint, as they had responded to the Tribe's May 30, 1975 injunction action against Petitioners Wilson, Lakin and Jackson, the Petitioners pleaded as follows:

1. Petitioners admit the Treaty of 1854 established the Omaha Indian Reservation;
2. Petitioners admit Barrett, in April and May 1867, surveyed the Blackbird Bend Oxbow;
3. Petitioners, nevertheless, affirmatively allege "all of the said [Blackbird Bend Oxbow] land was eroded away by the action of the Missouri River";
4. Petitioners then allege that the lands were completely replaced by accretions to the Iowa bank.⁷⁰

Predicated upon those affirmative defenses, Petitioners, in answering the Tribe's Complaint of October 6, 1975,

"COUNTERCLAIM

"(b) For a judgment quieting title to the lands.
..."

claimed by Petitioners Wilson and Lakin to have been replaced by accretions where the Blackbird Bend Oxbow had originally been situated.⁷¹

The Omaha Indian Tribe replied by denying the affirmative allegations and petitioned the denial of the Counterclaim prayed for by Petitioners Wilson, Lakin and Jackson.⁷²

Iowa answered the Tribe's October 6, 1975 Complaint, set forth general denials to most of the Tribe's allegations and alleged

Survey and that Frontispiece does not set forth all of the lands claimed by the Omaha Indian Tribe in their Complaint dated October 6, 1975.

⁷⁰ Appendix, pp. 156-158, para. 8.

⁷¹ *Ibid.*, at p. 162.

⁷² *Ibid.*, at pp. 178, 181.

"Defendants own the bed of the Missouri River between the thalweg and the ordinary high water mark. . . ." ⁷³

The State of Iowa offered no evidence in regard to the ownership of the land referred to in the last quotation. Following that broad assertion, Iowa then claimed title ". . . by additional reason of the quit claim deeds executed" by Raymond G. Peterson, to whom reference has been previously made, ⁷⁴ and to the deed from Petitioner Lakin to the State of Iowa. ⁷⁵ Having pleaded its claims to lands, title to which was deraigned from "squatter" Joseph A. Kirk, ⁷⁶ the State of Iowa prayed for a decree "quieting title" against the Omaha Indian Tribe in regard to the Blackbird Bend Area. It is also worthy of note that the State of Iowa joined Petitioners Wilson, Lakin and Jackson in the latter's contention that the Blackbird Bend lands,

" . . . which may at one time have been within the geographical area of the Omaha Indian Reservation or in the past occupied by the Omaha Indians, which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff to said land was extinguished thereby." ⁷⁷

Thus it is that Petitioners Wilson, Lakin, Jackson and the State of Iowa asserted the same affirmative defenses and were, of course, obligated to assume the burden of proving those affirmative defenses in support of their

⁷³ *Ibid.*, at p. 153.

⁷⁴ *Ibid.*, at pp. 258-262.

⁷⁵ *Ibid.*, at pp. 262-265. NOTE: The State of Iowa claimed additional lands, which are outside of the Blackbird Bend Area.

⁷⁶ See pp. 30, *et seq.*, particularly, p. 33, *supra*.

⁷⁷ Appendix, p. 154.

counterclaims asking for a decree quieting title against the Omaha Indian Tribe.

Petitioner Sorenson pleaded a general denial, together with assertions of the affirmative defenses of statute of limitations, estoppel and laches. ⁷⁸

The United States filed its Complaint to quiet title to some of the Blackbird Bend Oxbow lands and for injunctive relief against some of the Defendants, against whom the Omaha Indian Tribe proceeded in its case, Civil No. C 75-4024. ⁷⁹

Petitioners Wilson, Lakin, Jackson and Iowa asserted essentially the same defenses against the United States as they did in the Tribe's case. ⁸⁰ They likewise counterclaimed against the United States praying for a quiet title decree against both the United States and the Omaha Indian Tribe. ⁸¹ To the counterclaims filed by Petitioners, the United States replied denying those allegations. ⁸²

Iowa answered the Complaint of the United States in substantially the same manner that it answered the Complaint of the Omaha Indian Tribe. Iowa likewise counterclaimed against the United States petitioning the court for a decree "quieting title to the lands" conveyed to the State by Petitioner Lakin ⁸³ and by the aforesaid Raymond G. Peterson. ⁸⁴

⁷⁸ Appendix, p. 184; see also the denial of those affirmative defenses asserted by Petitioner Sorenson by the trial court's "Motion for Summary Judgment," Appendix, pp. 187-188; see note 49, p. 26, *supra*.

⁷⁹ Appendix, pp. 61, *et seq.*

⁸⁰ *Ibid.*, at pp. 73, *et seq.*

⁸¹ *Ibid.*

⁸² *Ibid.*, at pp. 94, 99.

⁸³ *Ibid.*, at p. 258.

⁸⁴ *Ibid.*, at p. 259. NOTE: The State of Iowa claimed additional lands, which are not part of this litigation.

It is on the background of the complaints of the Omaha Indian Tribe, all as reviewed above, and the answers to those complaints that the case went to trial on the merits. Failure of the Petitioners to sustain the burden of proving their affirmative defenses, either under the laws of the United States or the laws of the States, is manifested beyond doubt. A most comprehensive review of the entire record disclosed that the crucial findings made by the trial court were predicated upon opinion evidence unrelated to any facts and thus were speculative and conjectural, all as will be reviewed.

SUMMARY OF ARGUMENT

Admittedly, the Omaha Tribe and the United States originally held full title to the Omaha Indian Reservation. Part of that Reservation was an area known as the Blackbird Bend Oxbow. That Oxbow, around which flowed the Missouri River, was in existence when the United States and the Omaha Indian Tribe entered into the "Treaty with the Omahas, 1854." It is beyond dispute, moreover, that in April and May, 1867, T. H. Barrett, Surveyor for the United States, meandered the high water mark of the Missouri River in its course around the Blackbird Bend Oxbow. Similarly, it is beyond dispute that there were encompassed within the Barrett meander line 2900 acres of land. Further, there is no question that a substantial portion of the Blackbird Bend Oxbow was divided into 80-acre allotments and that those allotments were occupied thereafter by Omaha Indians for a great many years.

The United States and the Omaha Indian Tribe are now in peaceful possession and occupancy of the 2900 acres, pursuant to the preliminary injunction entered by the trial court on June 5, 1975 (Appendix, pp. 119, *et seq.*).

I

Both the Omaha Indian Tribe and the United States filed actions to quiet the title to the 2900 acres against the adverse claims asserted by Petitioners. Petitioners, responding to the complaints of the Tribe and the United States, asserted affirmative defenses and, by counter-claims, petitioned the trial court to enter a decree quieting the title of Petitioners against the claims of both the Tribe and the United States.

It was pleaded by Petitioners that, although the 2900 acres were meandered by Barrett in 1867, those 2900 acres no longer exist. It is the position of the Petitioners that the 2900 acres, which were originally part of the Omaha Indian Reservation, were totally obliterated by action of the Missouri River. Moreover, it is contended by Petitioners that the 2900 acres, which were allegedly obliterated, were completely replaced "under the sky," to use the term of the Petitioners, by accretions to the Iowa bank of the Missouri River.

Issue was joined in the trial on the merits predicated upon the contentions of the parties, as set forth above.

II

The Omaha Indian Tribe proved its *prima facie* case by offering evidence that (1) the 2900 acres, title to which is the subject matter of the case, were identically the same lands that were surveyed by Barrett in 1867; (2) the 2900 acres had not been obliterated and washed down the Missouri River, as contended by Petitioners; and (3) there were no accretions to the riparian lands in the State of Iowa to replace the 2900 acres surveyed by Barrett, assuming solely for argument that the 2900 acres had been washed down the stream, as contended by Petitioners—facts which, most assuredly, Petitioners did not and could not prove. The Court of Appeals, fully supporting the position of the Omaha Indian Tribe,

predicated upon its *prima facie* case, succinctly stated the consequences flowing from the proof entered into the record by the Tribe:

"It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines." (App., p. A21; 575 F.2d 631)

The Court of Appeals fully recognized that Petitioners had not proved that the Blackbird Bend lands had been obliterated and washed away, as Petitioners contend. The Court of Appeals likewise declared that the Tribe had overcome any presumption of accretions attaching to the Iowa bank by the proof offered into the record by the Tribe. Relative to the Tribe's proof that there were no accretions to the Iowa bank, the Court of Appeals made this most crucial declaration:

"The existence of a presumption of accretion, however, does not affect the outcome here. . . . The Tribe having presented substantial conflicting evidence on the issue of accretion, any presumption of accretion disappeared and had no further effect on their case." (App., p. A24, note 22; 575 F.2d 633)

Additionally, the Tribe proved that the Blackbird Bend Oxbow had historic stability dating back, at least, to the Lewis and Clark Expedition and that the lands are still in existence, now being occupied by both the United States and the Tribe.

III

Petitioners' failure to sustain the burden of proof that they assumed when they pleaded affirmatively that the Blackbird Bend Oxbow had been washed away and replaced by accretions is clearly demonstrated by an analysis of the record. For example, contrary to the claim by Petitioners Wilson and Lakin that they deraign title to

patents from the United States, it is undisputed that Petitioners, including Iowa, trace their titles to "squatter" Joseph A. Kirk. Confronted with the absence of good title, Petitioners, pursuant to their pleadings, undertook at great length to prove their affirmative defenses in regard to the alleged destruction and the replacement of the Blackbird Bend Oxbow.

Petitioners relied exclusively upon unsubstantiated opinions in support of their claims. There were no facts which would sustain their position. Nevertheless, the trial court adopted verbatim and uncritically the crucial findings prepared by Petitioners. The trial court concluded that Blackbird Bend was not only washed away but that it was replaced entirely by accretions from the Iowa banks. Predicated upon Petitioners' findings, the trial court entered a decree in favor of Petitioners quieting title to the 2900 acres in Petitioners against the claims of the Omaha Tribe.

IV

Throughout the trial on the merits, repeated objections were interposed by the Omaha Indian Tribe to the opinions offered into the record by Petitioners. It was pointed out to the trial court that there was no evidence in the record that would support the opinions being offered by the expert witnesses who were testifying on behalf of the Petitioners. The trial court had accepted those opinions as being evidentiary in character.

The Court of Appeals rejected the evidence, which was admitted into the record:

"The basic finding essential to the defendant's case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time

new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area. . . ." (App., p. A39; 575 F.2d 639)

Relative to that "basic finding essential to the defendant's [Petitioners'] case," the Court of Appeals rendered this specific opinion:

"We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." (App., pp. A39-A40; 575 F.2d 639)

In declaring the crucial findings of the trial court to be "clearly erroneous," the Court of Appeals reviewed in depth and in detail the evidence that was offered into the record by Petitioners. It referred to the "educated guesses" offered by a principal expert witness of Petitioners. (App., p. A59; 575 F.2d 648) In rejecting the expert's statement, whose testimony constituted "educated guesses," the Court of Appeals declared that "the ultimate conclusion may not rest on mere guesswork." (App., p. A63; 575 F.2d 650). Further, in regard to the trial court's "clearly erroneous" findings, the Court of Appeals rejected specifically the evidence that was offered as being "entirely speculative" (App., p. A44; 575 F.2d 641); "insubstantial" (App., p. A45; 575 F.2d 642). Other evidence was declared to be "highly conjectural." (App., p. A46; 575 F.2d 642).

In continuing its review of the trial court's findings, the Court of Appeals alluded to the conclusions of the trial court in regard to the movement of the Missouri River as shown by the map of 1890. Based upon the statements offered there by the trial court, the Court of Appeals stated that "There exists no factual predicate . . ." for the conclusion expressed by the trial court. (App., p. A56; 575 F.2d 643) Relative to Petitioners' evidence on the River movements during 1912 to 1923,

the Court of Appeals stated that ". . . the evidence [was] too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194." (App., p. A62; 575 F.2d 649)

V

The Court of Appeals was imminently correct in declaring that Federal law governed under the circumstances of the cases here for review. It is too clear for question that the determinative issue was "whether" title to the Blackbird Bend Oxbow had passed from the Tribe; "whether" the Federal law would control in regard to a dispute over an interstate boundary and in regard to the "good" title of the Tribe; and "whether" Congress, in its plenary and exclusive power over Indian affairs, had the authority to enact 25 U.S.C. 194, which placed the burden upon Petitioners.

Congress, in the exercise of its plenary power over Indian affairs, has adopted a protectionist policy with the object of retaining title in the Indians to their lands. In furtherance of that policy, Congress enacted 25 U.S.C. 194, as part of its broad plan to protect Indians against divestiture of title to their property. That statute provides that "In all trials about the right of property . . ." where an Indian has established a presumption of title or possession, the burden of proof will be on the "white person." The original case, which brought this matter to the Court, was "white person" Petitioner Jackson against Omaha "Indian" Edward L. Cline. Petitioners "white persons" Wilson and Lakin joined "white person" Jackson when the Tribe initiated a suit to stay the Order obtained in the State court by Jackson against Cline. Not only is the inceptive case squarely within the explicit language of the statute, but the Congressional intent, manifested by that Act, is clear beyond doubt. The Indians, where they can establish a presumption of title—

as they most assuredly did in these cases—the burden of proof moves to Petitioners. It is, moreover an established precept of statutory interpretation involving Indians that the statutes will be construed in favor of the Indians, if there is a doubt as to the explicit meaning of the statute.

Under those circumstances, it is manifest that the Court of Appeals was correct in its interpretation of 25 U.S.C. 194 and the application of it to Petitioners.

VI

Iowa's anomalous position is predicated upon the circumstances which prevailed in these cases. Iowa did not—and neither did the Petitioners—deraign title from patents. Iowa, like the other Petitioners, traced its title to the “squatter” Joseph A. Kirk. During the trial, Iowa offered no proof of title to the bed of the Missouri River. It did not invoke its sovereignty throughout the trial on the merits in regard to the ownership of the bed of that River or islands arising from the bed of the Missouri River. Rather, it relied exclusively upon quit claim deeds from Petitioner Lakin and other parties not before the Court. It did not claim that the title residing in it stemmed from its admission into the Union on an “equal footing” basis. Iowa simply accepted the evidence offered by Petitioners and the evidence offered by them failed. Thus it is that Iowa's case failed with the other Petitioners. None of the Petitioners, including Iowa, could have his title rise above the dignity of that of “squatter” Kirk.

The Court's Rule 40 precludes Iowa from raising here for the first time its claim to the bed of the Missouri River and the islands in the bed of that River.

Petitioner Iowa, moreover, joins the other Petitioners in seeking to have sustained the trial court's erroneous opinion that Nebraska law should be applied irrespective

of the fact that, throughout its Brief, Iowa urges the application of Iowa law without referring to the fact that the laws of Nebraska were applied throughout the case by the trial court.

The opinion of the Court of Appeals should be affirmed.

ARGUMENT

TRIAL ON THE MERITS

A. Tribe's Prima Facie Case

Admittedly, the Omaha Indian Tribe, Plaintiff and Respondent here, proved beyond question its *prima facie* case.⁸⁵ Relative to the fact that the Tribe, as a movant

⁸⁵ The Omaha Indian Tribe proved and there is general agreement that:

a. The United States of America and the Omaha Indian Tribe entered into the “Treaty with the Omahas, 1854.” (See, pp. 5-6, note 2, *supra*.)

b. The Blackbird Bend Oxbow was part of the Omaha Indian Reservation at the time the Treaty of 1854 was entered into, pursuant to which the Omaha Indian Reservation was created.

c. Barrett, in 1867, when surveying the entire Omaha Indian Reservation, meandered the high water line of the Missouri River in its course around the Blackbird Bend Oxbow. (See, Plate I, p. 10, *supra*; see also, pp. 8, *et seq.*, *supra*, *Resumé Of The History Of The Blackbird Bend Oxbow*.)

d. There are 2900 acres within the Blackbird Bend Oxbow surveyed by Barrett and the line which he meandered encompassed those lands. (*Ibid.*)

e. Barrett divided lands into 80-acre allotments for occupancy by individual Omaha Indians. (See, p. 11, *supra*, *Barrett's 1867 Allotment Survey*.)

f. The Missouri River moved eastward in its course around the Blackbird Bend Oxbow until 1875 and, in that year, the Missouri River reached its furthest eastern migration at a natural monument known as the Easterly High Bank.

g. Between 1875 and 1879, the Missouri River drastically changed its course. (See, p. 11, *supra*, *The 1879 Survey Of The Blackbird Bend Oxbow*; See Plate II, p. 13, *supra*.)

h. In 1884 and 1900, there was assigned to individual Indians allotments surveyed by Barrett in 1867. Those allotments were

in these proceedings, has sustained its initial burden, the Court of Appeals expressed this view:

"It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines."⁸⁶

Summarizing the status of the proceedings, after the Tribe's proof of its *prima facie* case had been entered into the record, the Court of Appeals added:

"Title to the Blackbird Bend area as depicted by the Barrett Survey was presumptively shown to be in the Tribe and therefore, notwithstanding the subsequent movement of the thalweg of the Missouri

occupied for a great many years by the individual Omaha Indian allottees. (See, p. 15, *supra*, 1884 Allotments Assigned To Omaha Indian Members And Their Occupancy Of The Blackbird Bend Oxbow.)

i. The Omaha Indian Tribe, further evidencing the continuity of the Blackbird Bend Oxbow, introduced in evidence the map prepared by the Missouri River Commission in 1890. That map located the Blackbird Bend Oxbow and it likewise established the center of the navigable channel around the Blackbird Bend Area at that time. (See, p. 16, *supra*, *Blackbird Bend Oxbow From 1890 To 1923*.)

j. Proof was likewise introduced by the Omaha Indian Tribe that the Missouri River, prior to 1890, moved progressively north and eastwardly from the Barrett Line to the Northerly High Bank. A large area of land, which had accreted to the Blackbird Bend Oxbow, extended from the Barrett Survey Line to the Northerly High Bank, the point of the furthest progression north and eastwardly by the Missouri River between the years 1890 and 1912. Petitioners introduced extensive evidence locating the Northrly High Bank as mapped by the Monona County in 1912. (Plate III is a copy of the map prepared by the Missouri River Commission locating the River in 1890 and disclosing the areas of accretions to the north and east from the Barrett Survey Line.) The extent of the accretion to the Barrett Line, due to river progression to the aforementioned Northerly High Bank, is part of the historic continuity of the Blackbird Bend Oxbow. (See, p. 16, *supra*, *Blackbird Bend Oxbow From 1890 To 1923*; Plate III.)

⁸⁶ See, App., p. A21; 575 F.2d 631.

River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question."⁸⁷

Having completed its proof of its *prima facie* case, the Omaha Indian Tribe was confronted with the contentions by the Defendants-Petitioners that the Blackbird Bend Oxbow had been totally obliterated by actions of the Missouri River and completely restored by accretions to the Iowa riparian bank of the Missouri River.⁸⁸ As will be subsequently reviewed, the Defendants-Petitioners had assumed, under the Iowa law, the burden of proving their affirmative defenses.⁸⁹ Otherwise stated, the contention that the Tribe had lost title to the 2900 acres encompassed within the Barrett Survey Line because those 2900 acres had been washed away and totally replaced does not come within the purview of the normal, general denial; hence, there resided with the Defendants-Petitioners, since the time when issue was joined among the parties, that they were required to prove the destruction of the Oxbow and the replacement of it.

Comporting fully with the burden of proof assumed by the Defendants-Petitioners in their answers to the complaints is 25 U.S.C. 194.⁹⁰ In specific terms, the Court of Appeals declared the applicability of 25 U.S.C. 194 to these cases on the grounds that it was part of the Federal law adopted by the Congress of the United States to

⁸⁷ See, App., p. A25; 575 F.2d 633.

⁸⁸ See, pp. 27, *et seq.*, *supra*.

⁸⁹ See, p. 50 *infra*.

⁹⁰ "§ 194. Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

protect the rights and interests of the Tribes. On the subject, the Court of Appeals cited an abundance of unvarying authority to sustain the proposition that the Federal law would be controlling, as distinguished from the State law. (P. 61, *supra*, "The Laws Of The United States Govern . . .")

On the subject of the undisputed facts that the lands in question were part of the Omaha Indian Reservation, established pursuant to the Treaty of 1854, the Court of Appeals, relative to 25 U.S.C. 194, said this:

"This historical fact shows 'previous possession or ownership' and is sufficient to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants."⁹¹

On the background of that burden of proof, reference will now be made to the record in the case as established by the Omaha Indian Tribe.

1. Proof By The Tribe That The Blackbird Bend Oxbow Was Not Obliterated, As Contended By Defendants-Petitioners

There has been reviewed in detail this overriding fact: The Blackbird Bend Oxbow was never obliterated and was never washed down the Missouri River, as pleaded by Defendants-Petitioners, which they unsuccessfully undertook to prove.⁹²

2. Rebuttal Of Presumption Of Accretion By The Tribe

Irrespective of applicability of Federal law to these cases and whether there prevailed in these cases a presumption of accretions, as recognized by the laws of Iowa,

⁹¹ See, App., pp. A21-A22; 575 F.2d 631.

⁹² See, pp. 8, *et seq.*, *supra*, *Resumé Of The Blackbird Bend Oxbow*. See, Plate I, p. 10; Plate II, p. 13; Plate III, p. 17; Plate IV, p. 21; Plate V, p. 22, *supra*.

the Tribe proved that: There were no accretions to either the Easterly or the Northerly High Banks.⁹³

⁹³ In addition to the proof of its *prima facie* case, the Omaha Indian Tribe proved the following:

a. The Missouri River, in the years 1875-1879, abruptly and suddenly abandoned its deeply incised, clearly defined bed of the stream, which today is an abandoned stream bed at the toe of the Easterly High Bank:

(1) There were no accretions to the Easterly High Bank. (See, p. 11, *supra*.)

In error, Petitioners, in their Brief at p. 16, make this statement, which is wholly without foundation: "In 1894 the area under the sky formerly occupied by the east end of the Barrett survey peninsula was surveyed as accretion land by the county surveyor . . . and apportioned to the Iowa riparian owners accordingly. (W. Ex. X3, R. 1779, 1784)." The alleged accretion survey was not from the riparian lands. Rather, that survey is most unusual. It commences at the totally obliterated 1852 Anderson Line, which no longer existed at the time of the alleged accretion survey. See, in that connection, the cited exhibit. The Petitioners' witness admitted that the Anderson survey line was no longer extant, thus depriving the alleged accretion survey of any merit. The survey was not and could not have been to the riparian bank, which was far to the east. It was not, as Petitioners say, "apportioned to the riparian owners." There were no riparian owners at the Anderson survey line. See, transcript, p. 1781. A most liberal trial judge, viewing the exhibit, upon which Petitioners rely, admitted it was being "marginal." Transcript, p. 1784.

(2) The Missouri River, in keeping with the prediction of Barrett in 1867, during the years 1875-1879, suddenly and abruptly left the Easterly High Bank, permanently severing from the Blackbird Bend Oxbow a portion of it, leaving that land east of the Missouri River and situated in the State of Iowa. (See, *The 1879 Survey Of The Blackbird Bend Oxbow*, particularly at p. 11, *et seq.*, *supra*.)

(3) There were no accretions to the Northerly High Bank, the furthest point of migration of the Missouri River, which occurred in 1912. From that Northerly High Bank, the Missouri River suddenly and abruptly abandoned its 1912 channel and left, at the toe of the Northerly High Bank, a deeply incised, clearly defined abandoned bed of

The comprehensive, factual material introduced into the record by the Omaha Indian Tribe to rebut the presumption of accretion was explicit and in detail. Among other things, the Tribe proved the difference between channel fill, of which the abandoned bed of the Missouri River at the toe of the Easterly and Northerly High Banks is composed, and the material, of which accretions are comprised.⁹⁴

the stream, which is easily located today. (See, *Blackbird Bend Oxbow From 1890 To 1923*, pp. 16, *et seq.*, *supra*.)

(4) Prior to 1923, the Missouri River abandoned its 1912 stream bed and moved sharply to the west of the Blackbird Bend Oxbow, leaving the land surveyed by Barrett in 1867 east of the Missouri River in the State of Iowa. (*Ibid.*, at p. 16, *supra*. See Plate IV, p. 21, *supra*.) It will be observed that the Missouri River was west of the Blackbird Bend Oxbow lands and that a very large portion of the Blackbird Bend Oxbow lands were in place. They had not been and have never been destroyed by river action or any other action, as contended for by Petitioners. (See, *Blackbird Bend Oxbow From 1890 To 1923*, p. 16, *supra*. See Plate IV, locating the 1923 River, all as surveyed by the United States Corps of Engineers.)

⁹⁴ See, below, and references. There was general acceptance of the Tribe's proof, which distinguished accretions, allegedly attached to the Easterly and Northerly High Banks, from channel deposits, which were found at the toe of those banks. (For description of the Easterly High Bank, see, pp. 11-12, note 13, *supra*; for description of the Northerly High Bank, see, p. 18, note 29, *supra*.)

Definitions of Crucial Geologic and Topographical Features:

Dr. Robinson obtained samples (Tribe's Exhibits 89, 90, 91) on the representative geologic and soil deposits involved in these cases, the definitions of which are generally accepted by all parties.

a. *Channel Fill Deposits* are found in the abandoned bed of the Missouri River. They consist principally of silts and clay. They are fine deposits which have been found by Dr. Robinson, Dr. McQuivey and Dr. Hallberg in the abandoned channels at the foot of the described Easterly and Northerly High Banks. (Robinson, Vol. 6, p. 822, lns. 20-24; McQuivey, Vol. 12, p. 1615, lns. 1-3; Hallberg, Vol. 19, p. 2824, lns. 5-23.)

b. *Point Bar Deposits* are primarily fine to medium sands. The Blackbird Bend meander lobe consisting of 2900 acres is

By proving that accretions did not attach to either the Easterly or Northerly High Banks, there was defeated the second facet of Petitioners' affirmative defenses—that the Blackbird Bend Oxbow was replaced by accretions to the Easterly and Northerly High Banks and that those accretions replaced the original 2900 acres "under the sky."

The Court of Appeals, having reviewed the Tribe's evidence proving that accretions did not attach to the Easterly or Northerly High Banks, made this statement:

"The existence of a presumption of accretion, however, does not affect the outcome here. . . . The Tribe having presented substantial conflicting evidence on the issue of accretion, any presumption of accretion disappeared and had no further effect on their case."⁹⁵

There is an abundance of sound authority in support of the last-quoted principle.⁹⁶ Recent commentaries, re-

principally composed of point bar deposits. (Robinson, Vol. 6, p. 820, lns. 20-21; Hallberg, Vol. 18, p. 2587, lns. 3-9.)

c. *Over Bank Deposits* consist of fine silt and clay. The over bank deposits are those sediments left upon the land by the Missouri River during periods of high water or floods during which the river left its ordinary banks and inundated the surrounding Lands. It was those Nile-Like inundations carrying sediments upon the land that have provided the good top soil found at the surface of the 2900 acres, the title to which is the subject matter of these partially consolidated cases. (Robinson, Vol. 8, p. 821, lns. 18-21.)

d. *Alluvium or Alluvion Deposits*, of which accretions are comprised, are the materials consisting of sand, silt, and gravel which attach to riparian land *due to river action*. They are the deposits of which accretions to riparian lands are comprised when attached to riparian land *by river action*. Basically, they consist of point bar deposits, as described above.

⁹⁵ See, App., p. A24, note 22; 575 F.2d 632.

⁹⁶ *Sperberg v. Goodyear Tire & Rubber Co.*, 51 F.2d 708 (CA 6, 1975); *cert. den.*, 423 U.S. 713 (1975). As the Court there pointed out, citing *Del Vecchio v. Bowers*, "... a statutory presumption 'falls

viewing the new Federal Rules of Evidence, fully support the declaration by the Court of Appeals that the Tribe had overcome any presumption respecting accretions that might have arisen in these cases.⁹⁷ It is very clear that Petitioners are not entitled to rely upon any presumption of accretions that might have been available to them. The Tribe defeated the presumption by the evidence which it introduced, all as declared by the Court of Appeals.

B. Failure Of The Defendants-Petitioners To Sustain Their Burden Of Proof Assumed By Pleadings And Pursuant To 25 U.S.C. 194

By its in-depth analysis of the facts in these complex cases, the Court of Appeals was capable of determining the fatal weaknesses of Defendants-Petitioners' unsuccessful attempt to prove (1) the alleged obliteration of the 2900 acres comprising the Blackbird Bend Oxbow; and (2) the alleged replacement "under the sky" of those 2900 acres by a new 2900 acres of accretions to the Iowa bank.

Predicated upon the analysis of Defendants-Petitioners' attempts to prove their affirmative defenses, the Court of Appeals made this most crucial ruling:

"The basic finding essential to the defendant's case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by

out of a case' when the party against whom the presumption works meets his burden of offering evidence sufficient to justify a contrary finding." 296 U.S. 280, 286 (1935).

⁹⁷ 21 *Federal Practice and Procedure, Federal Rules of Evidence*, § 5124, "' Presumptions' Defined," *et seq.* See also, 63 *Virginia Law Review*, 285, stating, "The burden of production is the obligation of a party to present sufficient evidence on a disputed issue to permit a fact finder to act upon it." See also, *Federal Rules of Evidence Manual*, Redden & Saltzburg, Rule 301, p. 45.

the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area. . . ." ⁹⁸

Using unequivocal terms, the Court of Appeals rejected that crucial finding by the trial court. By adopting that course, the Appellate Court removed the underpinnings of the trial court's conclusions and Memorandum Opinion, resulting in the reversal of the trial court, which brings these cases here for review. These are the words of the Court of Appeals in its rejection of the above-quoted finding:

"We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." ⁹⁹

Petitioners, although they put in thousands of pages of testimony and innumerable exhibits, failed to sustain the burden of proving the obliteration of the Blackbird Bend Oxbow and the replacement of it by accretion. Their principal witness, Dr. Kennedy—who had visited the land but one day—speaking in regard to Missouri River movement, 1875-1879, and without facts in support, expressed his opinion that the Blackbird Bend Oxbow:

"Eroded away, and consequently much of the material that we see in 1875 as Barrett bar has been taken away and is now on its way to the Gulf of Mexico." ¹⁰⁰

That erroneous testimony comports with Petitioners' witness' earlier statement that the Blackbird Bend Oxbow had been "obliterated" by the Missouri River.¹⁰¹

⁹⁸ See, App., p. A39; 575 F.2d 639.

⁹⁹ See, App., pp. A39-A40; 575 F.2d 639.

¹⁰⁰ Appendix, p. 250.

¹⁰¹ *Ibid.*, at p. 246, where Dr. Kennedy states: "I have testified that it is my judgment that this whole convex bar [Blackbird Bend

Magnitude of the erroneous testimony that the Blackbird Bend Oxbow had been "taken away" or "obliterated" is demonstrated by a simple examination of Plate II.¹⁰² There, the Blackbird Bend Oxbow, during a period of very high water, far from being washed away, was mapped with large stands of timber growing on the lands allegedly obliterated or allegedly washed away. It is worthy of note, moreover, that the lands that had been "obliterated" were thereafter occupied for a great many years by individual Indian allottees, who farmed the lands.¹⁰³

It has been demonstrated that the Blackbird Bend Oxbow had not been washed away, as testified to by Petitioners' witness. The issue next to be examined is the contention by Petitioners that, in some manner, the Blackbird Bend Oxbow had been replaced "under the sky" by accretions to the Easterly and Northerly High Banks. Again, Petitioners' witnesses failed to support their opinions. Repeatedly, throughout the trial, the witnesses expressed opinions without a scintilla of evidence in the record to support them.

On the subject of accretions to the Iowa bank, Petitioners' principal witness was unable to locate where the accretions had attached. He testified as follows in regard to the alleged accretions:

"I cannot say specifically that they were merged [alleged accretions] together here or at this point or at some other point. All I can say is I would *expect* as rivers normally behave for this to be an

Oxbow] had been obliterated during this period of the high flows that occurred in the four years between '75 and '79."

¹⁰² See, p. 13, *supra*.

¹⁰³ See, p. 15, *supra*, 1884 Allotments Assigned To Omaha Indian Members And Their Occupancy Of The Blackbird Bend Oxbow.

area of deposition, and deposition would occur *preferentially* along the Iowa bank."¹⁰⁴

The problem with which Petitioners' witness was confronted was the undeniable proof of the Tribe's witnesses that there were no accretions to either bank.¹⁰⁵ For Petitioners to offer evidence would have required a factual predicate that was non-existent and the terms "expect" or "preferentially" fall far short of the requirements for proof of a physical phenomenon such as accretions to a bank.

Another of Petitioners' witnesses, Dr. Hallberg, in an effort to support the contentions that the Blackbird Bend Oxbow had been "obliterated" or washed away found great difficulty in supporting such contentions. In the course of his testimony, that witness, in candor, admitted that his testimony, "—is indeed an educated guess no matter whose opinion or what his opinion is, sir."¹⁰⁶

Comments in regard to the Court of Appeals' rejection as being "clearly erroneous" of the trial court's "basic finding essential to the defendant's [Petitioners'] case" has disclosed that Petitioners relied upon opinion evi-

¹⁰⁴ Appendix, pp. 255-56 [emphasis added].

¹⁰⁵ See the extensive testimony proving that there were no accretions to either the Easterly or Northerly High Banks. See, description of Easterly High Bank, at pp. 11-12, note 13, *supra*; and description of Northerly High Bank, at p. 18, note 29, *et seq.*, *supra*. The proof that there were no accretions to the Easterly or Northerly High Banks was predicated upon intensive soil and geologic investigations, which demonstrated that the channel-fill deposits were not accretions to the bank and, hence, the abandoned bed of the stream constituted proof that the River had left suddenly and abruptly and had not accreted to the banks antecedent to the departure of the River from the toe of those two banks, the Easterly and Northerly High Banks; see App. p. A49, note 49; 575 F.2d 643, note 49.

¹⁰⁶ Appendix, p. 242. See also Petitioners' "educated guesses," App., p. A49, note 49; 575 F.2d 643.

dence, which was totally unsubstantiated by facts.¹⁰⁷ Additionally, the Court of Appeals was sharply critical of the evidence received into the record by the trial court in regard to every phase and facet of the case. Relative to the trial court's finding that there were accretions in 1890 east of the Missouri River, the Court of Appeals said this:

"There exists no factual predicate whatsoever to support this conclusion."¹⁰⁸

The opinion evidence offered by Petitioners relative to the years subsequent to 1890 and down through 1923 was equally defective, as the testimony offered relative to the earlier years. Reference is made to the fact that Petitioners' witnesses had assessed their testimony as being "educated guesses." The Court of Appeals then stated that Petitioners' opinion evidence was "extremely speculative" and insufficient to "sustain" Petitioners' burden of proof.¹⁰⁹

1. Clearly Erroneous Findings Prepared By Petitioners And Adopted Verbatim By The Trial Court¹¹⁰

The Court of Appeals, rejecting "The basic finding essential to the defendant's case," stated:

"In reviewing this finding our task is not made easier by the district court's verbatim adoption of the defendant's analysis of the evidence and proposed findings of fact including the defendants' credibility assessments of the witnesses."¹¹¹

¹⁰⁷ See, App. p. A39; 575 F.2d 639.

¹⁰⁸ See, App., p. A56; 575 F.2d 646.

¹⁰⁹ *Ibid.*, at p. A59; 575 F.2d 648.

¹¹⁰ See, Appendix at p. 44—Proposed Findings of Fact, Conclusions of Law, and Decree submitted by Petitioners to the trial court, Judge Bogue presiding.

¹¹¹ App., p. A39; 575 F.2d 639.

Petitioners complain in regard to the last-quoted observation by the Court of Appeals,¹¹² yet the Court of Appeals dealt lightly with the matter.

On the crucial issues respecting the alleged obliteration of the Blackbird Bend Oxbow, Petitioners proposed the following finding to the trial court—Judge Bogue presiding—

"As the river moved in a gradual progression to the south and west it was eroding against the meander lobe as surveyed by Barrett in 1867 destroying and entirely washing the land surveyed by Barrett down the river (2955:17-2956:19)."¹¹³

That identical language proposed by Petitioners, was adopted by the trial court without change.¹¹⁴ Yet, as reviewed immediately above, the Blackbird Bend Oxbow was not destroyed and washed away.¹¹⁵

The transcript citations adopted by the trial court pertain to the totally erroneous testimony of Petitioners' witness, which is quoted above.¹¹⁶ Continuing to copy verbatim—and uncritically—Petitioners' proposed findings, the trial court adopted this most crucial language in regard to accretions to the Iowa bank:

¹¹² Pet.'s Br., p. 12.

¹¹³ See, Appendix, p. 44, Petitioners' Proposed Findings. Findings by the Court, 1852-1879, commencing at pp. 19, *et seq.*, and appearing on p. 20.

¹¹⁴ See, App., at p. B28.

¹¹⁵ See, p. 54, *supra*.

¹¹⁶ Appendix at p. 246, declaring that the Blackbird Bend Oxbow had been obliterated or, as otherwise stated by Petitioners' witness: The Blackbird Bend Oxbow had been "Eroded away, and consequently much of the material that we see in 1875 as Barrett bar has been taken away and is now on its way to the Gulf of Mexico."

"Deposition of silt, sands, and gravels (described by plaintiffs' counsel as 'alluvion') was occurring during this process. This resulted in additions of new land to the left bank which new land was beyond the power of identification. It was in fact accretion to the Iowa riparian landowners . . . (2951:3-2952:15)." ¹¹⁷

Identical language, prepared by Petitioners, was adopted by the trial court.¹¹⁸ That there were no accretions to the Iowa bank is too clear for question. Petitioners offered no facts to the contrary. The testimony from Petitioners' witness who, without knowledge on the subject, declared that he would "expect" accretions and that they would "preferentially" attach to the Iowa bank.¹¹⁹ Those findings were, moreover, predicated upon the "educated guesses" of Petitioners' witnesses.¹²⁰

It is abundantly manifest that the Court of Appeals had no alternative but to declare as it did:

"We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." ¹²¹

¹¹⁷ Appendix, pp. 255-56.

¹¹⁸ App., at p. B28.

¹¹⁹ Appendix, pp. 255-56. NOTE: The transcript citations are identical to those adopted by the trial court and there were no facts in the record on the subject.

¹²⁰ See, p. 54, *supra*.

¹²¹ See App., pp. A39-A40; 575 F.2d 639-640. On the subject of clearly erroneous "findings," the Court said this:

"There seem to be nothing more than conjectures . . . No inference of fact or of law is reliable drawn from premises which are uncertain . . . It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption." (United States v. Ross, 92 U.S. 281, 283 (1894).

That statement is particularly applicable to the trial court's findings in these cases.

[Footnote continued on page 57]

2. *Petitioners' Source Of Title—"Squatter" Kirk—An Element Contributing To The Deficiencies In The Proof Offered By Them In Support Of Their Affirmative Defenses*

Though Petitioners, including the State of Iowa, have asserted good title to the lands, which they claim in these proceedings, it has been demonstrated above that those claims are without merit. As reviewed, Petitioners Wilson, Lakin and Jackson do not deraign their title to patents as they profess in their Briefs.¹²² Petitioner Iowa can make no "equal footing" claim here. Iowa and the other Petitioners deraign their titles from "squatter" Joe Kirk.¹²³

¹²¹ [Continued]

Citing United States v. United States Gypsum Co., Moore, in his works, sets forth this statement which, it is believed, is controlling here:

"A finding is 'clearly erroneous' when although there is evidence to support it [here, there is none], the review court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

5A *Moore's Federal Practice*, § 5203 [1]. See Jackson v. Hartford Accident & Indemnity Co., 422 F.2d 1272, 1278 (CA 8, 1970); *cert. den.*, 400 U.S. 855 (1970); Manufacturing & Equipment Co. v. Commission, 434 F.2d 373, 376 (CA 8, 1970); Robinson v. The Home Indemnity Co., 438 F.2d 1273, 1274 (CA 8, 1971); Union v. Millstream, 474 F.2d 948, 952 (CA 8, 1973); Solomon v. Crown Life Ins. Co., 536 F.2d 1233, 1239 (CA 8, 1976).

There has been reviewed above the admission by the principal witness of the Petitioners that his testimony was an "educated guess." (p. 15, note 23, *supra*; App., p. A59; 575 F.2d 648) Indeed, the evidence, which was offered by Petitioners, relative to the period of 1879 to 1912, did not meet the test of an "educated guess." Findings by the trial court on the Missouri River movements during the critical 1890 period were rejected by the Court of Appeals in these terms: "There exists no factual predicate whatsoever to support this conclusion." (App., p. A56; 575 F.2d 646)

¹²² Pet.'s Br., p. 4.

¹²³ See, pp. 25, *et seq.*, *supra*, "Squatter" Joseph A. Kirk Is Principal Source Of Title For Petitioners Wilson, Lakin, Jackson

Petitioners' proof, as to all aspects of these cases, has invariably fallen far short of the pleadings that they filed with the trial court or the contentions which they have advanced both here and before the Court of Appeals. That circumstance was particularly manifested in regard to the periods of 1890-1912 and 1912-1923.¹²⁴

3. *Petitioners, Under The Laws Of Iowa, Assumed The Burden Of Proof In These Consolidated Cases, Which They Failed To Sustain*

There has been reviewed above in some detail that the Omaha Indian Tribe proved its *prima facie* case.¹²⁵ There has likewise been emphasized the fact that Petitioners, including the State of Iowa, do not deraign their title from patents issued by the United States.¹²⁶ Petitioners, bereft of other defenses, pleaded affirmatively that they acquired title by reason of the "obliteration" of the Blackbird Bend Oxbow by the Missouri River and the replacement—"under the sky"—of the lands formerly of which the Oxbow was composed, by accretions to the Easterly and Northerly High Banks.¹²⁷ Petitioners coun-

(*Wilson's Lessee*)—*Not Patents As Asserted*; see, p. 28, *supra*, *Petitioner State of Iowa Traces Its Title To "Squatter" Joseph A. Kirk*.

¹²⁴ It will be observed that the trial court not only adopted the precise headings—"E. Missouri River Between 1890 And 1912" and "F. Missouri River Between 1912 And 1923"—it adopted identically the same language and citations, as were offered by Petitioners. Compare Petitioners' findings, pp. 23, *et seq.*, Appendix, p. 44, with trial court's findings, at App., B31 *et seq.*

¹²⁵ See, pp. 43, *et seq.*, *supra*.

¹²⁶ See, p. 25, *supra*, "*Squatter" Joseph A. Kirk Is Principal Source Of Title For Petitioners Wilson, Lakin, Jackson (Wilson's Lessee)—Not Patents As Asserted*, particularly p. 28, *supra*, respecting Iowa's source of title. Petitioner Sorenson's title presents a quandry. Apparently, title is asserted to the lands in question in these proceedings predicated upon an Affidavit of Possession.

¹²⁷ See, pp. 30, *et seq.*, *supra*.

terclaim for decrees against the Omaha Indian Tribe, quieting title in them.¹²⁸

Petitioners, having pleaded their affirmative defenses and having prayed for a decree quieting title against the Omaha Indian Tribe, had the burden of proof in regard to their claims. Few things are more specifically settled than the obligation of the Petitioners under the laws of Iowa. On the subject, the Supreme Court of Iowa had this to say:

"The defense upon which Clara Cotter, in the suit to quiet title, bases her claim to the ownership of the property, is an affirmative one, and the burden is upon her to establish it."¹²⁹

Again, the Supreme Court of Iowa, reviewing pleadings and claims similar to those here involved, made this specific ruling:

". . . [defendants] in their defenses in the quiet title claim made certain affirmative allegations. They have the burden of sustaining their claims of fraud [and related defenses]. . . ."¹³⁰

Quite recently, the Court of Appeals for the Fifth Circuit said this:

"Since the Buras heirs have asserted title to the land which is in the possession of the United States, they have the burden of proving their title."¹³¹

There is universal acceptance of the principles of law, including 25 U.S.C. 194, that Petitioners here had the

¹²⁸ See, pp. 33, *et seq.*, *supra*.

¹²⁹ *Crawford v. Cotter*—Iowa—257 N.W. 354, 356 (1934).

¹³⁰ *In re: Sterling's Estate*, 249 Iowa 1260; 92 N.W.(2d) 134, 138 (1958).

¹³¹ *United States of America v. Buras*, 458 F.2d 346, 349-50 (CA 5, 1972), *cert. den.*, 414 U.S. 865 (1973).

obligation of proving the Blackbird Bend Oxbow had been destroyed by the action of the Missouri River and replaced by accretions to the Iowa bank.¹³² That they failed in that burden is the main thrust of the opinion of the Court of Appeals which is before the Court.

C. The Laws Of The United States Govern Where, As Here, The Issue Is "Whether" Title To The Blackbird Bend Oxbow Passed Out Of The Omaha Indian Tribe And The United States

There is a single, paramount issue which determines the law—Federal or State—to be applied: Did title to the 2900 acres of land—originally held by the Omaha

¹³² *Swim v. Langland*, 234 Iowa 46, 11 N.W.2d 713, 715 (1943); *Frost v. Markham*, 86 N.W. 261; 526 P.2d 808 (1974); *York v. James*, 62 Wyo. 184; 165 P.2d 109 (1946); *Baxter v. Vasquez*, 501 S.W.2d 201, 206 (1973). "Where each party to a quiet title action is claiming title against the other, the burden of proof is upon the respective parties to prove better title than the others And the burden of proving the existence of all the elements of adverse possession is upon the party claiming title by adverse possession." See, *Wilcox v. Pinney*, 250 Iowa 1378, 98 N.W.2d 722 (1959), there the court stated: "Thus defendant-counterclaimant's burden was a heavy one. They must not only show the land plaintiff claims was entirely destroyed, but that the restored land was rightly theirs." See, in this connection, IX *Wigmore on Evidence, Burden of Proof*, § 2485; see also 1A *Federal Rules of Civil Procedure*, 0.314(2); see also Rule 8(c), *Federal Rules of Civil Procedure* (c) *Affirmative Defenses*. "In pleading to a preceding pleading, a party shall set forth: estoppel, . . . laches and any other matter constituting an avoidance of affirmative defense." Iowa's Rules of Court are of interest in this connection. There it is declared: "No variance between pleading and proof shall be deemed material unless it is shown to have misled the opposite party to his prejudice in maintaining his cause of action or defense. *But where an allegation or defense is unproved in its general meaning, this shall not be held a mere variance but a failure of proof.*" [Emphasis supplied] See, Iowa Rules of Court, 1978, Rule 106. For a general statement, predicated upon substantial authority, see 65 Am. Jur. 2d, p. 209 § 79, "Where defendant, in an action to quiet title, substantially asserts and relies upon a fact as an affirmative issue, he must establish such fact." See also, 65 Am. Jr., *Quieting Title*, "Defendant's Burden of Proof."

Indian Tribe, pursuant to its 1854 Treaty, surveyed by Barrett in 1867, occupied many years thereafter by members of the Omaha Indian Tribe and now presently occupied by the United States and the Tribe—pass out of the Omaha Indian Tribe and the United States? The inquiry thus presented is inextricably related to the boundary issue.¹³³

As to the applicability of Federal law to claims presented here by the Omaha Indian Tribe, the Court of Appeals, among other things, said this:

"The present dispute is not related to incidents or rights flowing from a conveyance of public land or related to a patent grant of Indian allotment lands. [Rather, stated the Appellate Court] . . . the direct challenge made by the Iowa landowners here affects the boundary line to the reservation land itself, as it was originally contained in the Barrett Survey and established by the Treaty of 1854."¹³⁴

Continuing in regard to the applicability of Federal law in light of the threats by Petitioners to the Omaha Indian Tribe, the Appellate Court added:

"The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands."¹³⁵

To the aggressive claims of Petitioners against the Omaha Indian Tribe, the Court of Appeals said this:

"Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. Presumptively, at least, this right has never been extinguished."¹³⁶

¹³³ App., p. A20; 575 F.2d 631.

¹³⁴ See, App., p. A17; 575 F.2d 629.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

In applying Federal—not State—law to that factual statement, the Court of Appeals adhered to an unvarying line of decisions, as enunciated by the Court throughout this Nation's history. Among the numerous cases cited by the court below was the relatively recent *Oneida* decision, in which the Court said:

"In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law."

Continuing, the Court made this statement which, it is respectfully submitted, governs here:

". . . it rests on the not insubstantial claim that federal law protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession."¹³⁷

There is, of course, an imperative need for the National Government to apply its own laws rather than to apply the laws of the States to determine whether title has passed from the Tribe and the United States. The Court succinctly stated the reasons why State law must not control under the circumstances here before the Court:

"A different rule would place the public domain of the United States completely at the mercy of state legislation."¹³⁸

¹³⁷ App., pp. A17-A18; 575 F.2d 629. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974).

¹³⁸ *Camfield v. United States*, 167 U.S. 518, 525 (1897).

Justice Marshall, in the formative years of this Nation, explained the reasons why the United States, respecting authority specifically delegated to it, should not look to State law or State determinations:

"No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on

From a very early date in this Country's history, predicated upon the concepts reviewed above, the Court said this:

"We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States. . . ." ¹³⁹

The Court of Appeals, quoting from *Corvallis*, likewise—based upon an abundance of authority—declared that,

"If [as here] a navigable stream is an interstate boundary, this Court . . . has necessarily developed a body of federal common law to determine the effect of a change in the bed of the boundary."¹⁴⁰

There are no authorities that have been found or which have been cited by Petitioners which would point to error

those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone it was expected to rely for the accomplishment of its ends." (*McCullough v. Maryland*, 17 U.S. 315, 424 [1819])

The same concept, declaring the exclusive power of the United States to determine when title passes from the United States, has been expressly applied to circumstances here involved where the issue was whether the title of the Indians had passed out of their ownership. See, *United States v. Santa Fe Pacific RR. Co.*, 314 U.S. 339, 345 (1941); see also p. 347. There it is declared, respecting title to Indian lands, that the "power of congress . . . is supreme." See, *Light v. United States*, 220 U.S. 523 (1911).

¹³⁹ *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 (1977).

¹⁴⁰ App., p. A13; 575 F.2d 628. Taking cognizance of the 1943 Boundary Compact between Iowa and Nebraska, the Court of Appeals referred to the fact that the title issue here involved arose antecedent to the 1943 Compact. That Compact provided that title would not be affected by the change in the boundary. The Appellate Court declared that ". . . in this case, since issue concerns who held good title to the land in question prior to 1943, federal law must be applied." App., p. A15; 575 F.2d 628.

by the Court of Appeals in applying Federal law to these consolidated cases now before the Court.

1. 25 U.S.C. 194—An Appropriate Exercise Of Authority By The Congress Of The United States And Correctly Interpreted By The Court Of Appeals¹⁴¹

The Court of Appeals stated:

"It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines."¹⁴²

Title, previous possession and present occupancy and possession of the 2900 acres—all within the purview of 25 U.S.C. 194—were proved by the Tribe and agreed to by Petitioners.¹⁴³ Predicated upon that ownership and possession, the Court of Appeals stated that the Tribe's proof sufficed "... to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants."¹⁴⁴ As will be reviewed, the complaints of Petitioners, respecting 25 U.S.C. 194 and the application of it to them, are basically academic by reason of their own conduct in these proceedings—their efforts, for example, to sustain their burden of proof and their failure in that regard.

¹⁴¹ 25 U.S.C. 194: "§ 194. Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

¹⁴² See, App., p. A21; 575 F.2d 631.

¹⁴³ *Ibid.* See, pp. 43, *et seq.*, *supra.*

¹⁴⁴ App., p. A22; 575 F.2d 631.

2. Petitioners Complain About Their Burden Of Proof They Perforce Assumed By Their Pleadings

Petitioners, under the force of circumstances, pleaded the affirmative defenses, which have been reviewed in detail.¹⁴⁵

Bereft of other defenses, Petitioners claimed title in themselves by reason of the obliteration of the Blackbird Bend Oxbow and the replacement of it. In support of their affirmative defenses, Petitioners offered thousands of pages of oral testimony, innumerable pages of documentary evidence and numerous demonstrative exhibits. Comprehensive findings were prepared by Petitioners for the trial court.¹⁴⁶ Those findings—albeit, clearly in error—demonstrate conclusively the extent to which the Defendants offered evidence in support of their affirmative defenses.¹⁴⁷

As emphasized above, the Court of Appeals, in the exercise of its power, authority and jurisdiction, after carefully scrutinizing the record, declared that the critical findings proposed by Petitioners and adopted verbatim by the trial court were "clearly erroneous."¹⁴⁸

3. Petitioners Do Not Assert That 25 U.S.C. 194 Placed A Heavier Burden Upon Them They Voluntarily Assumed

Extensive argument is presented by Petitioners in support of their contention that the Court of Appeals erred in placing the burden of proof upon them in accordance with 25 U.S.C. 194.¹⁴⁹ They cannot, nevertheless, deny

¹⁴⁵ See, pp. 30, *et seq.*, *supra.*

¹⁴⁶ See, pp. 54, *et seq.*, *supra.*

¹⁴⁷ See, App., pp. B1-B61.

¹⁴⁸ See, pp. 54, *et seq.*, *supra.*

¹⁴⁹ See, Pet.'s Br., pp. 26-42.

that the burden placed upon them was only commensurate with and no greater than the burden of proof that they assumed when they pleaded the affirmative defenses against the Tribe and petitioned for a quiet title decree predicated upon those defenses.

Under the circumstances, it is impossible to perceive the merit in Petitioners' complaint against the ruling of the Court of Appeals. Petitioners voluntarily assumed the burden of proof placed upon them by 25 U.S.C. 194. They failed to sustain that burden.¹⁵⁰

4. *Petitioners Come Squarely Within The Provisions of 25 U.S.C. 194*

The language of 25 U.S.C. 194 is explicit and its objectives are manifest. The Court of Appeals declared 25 U.S.C. 194 "clearly evidences a protectionist policy with regard to Indians."¹⁵¹ The trial court—Judge McManus presiding—expressed the same broad principles in these terms:

"... public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty."¹⁵²

Petitioners¹⁵³ seek to avoid the historic congressional policy of protecting the Indians in their rights to their lands. They would have the Court restrict 25 U.S.C. 194 to an "individual Indian" against an "individual white person." That interpretation would render the Act a nullity. It would preclude the United States, Trustee, from appearing on behalf of an "Indian" within the purview of 25 U.S.C. 194. Petitioners would also

¹⁵⁰ See, pp. 58, *et seq.*, *supra*.

¹⁵¹ See, App., p. A22; 575 F.2d 632.

¹⁵² Appendix, pp. 119, 123.

¹⁵³ Pet.'s Br., pp. 26, *et seq.*

preclude a Tribe from acting on behalf of its members. Equally clear—if the interpretation of 25 U.S.C. 194, as asserted by Petitioners, is accepted—an "Indian" would be precluded from invoking 25 U.S.C. 194 when participating in multiple-party/multiple-issue litigation of the charter here involved; the type normally attendant upon major litigation.

Petitioners' interpretation involves a clear violation of the trust obligation. It would, for instance, have prevented the United States from entering cases of the character initiated in the State court by "white person" Jackson to enjoin individual Omaha "Indian" Cline from occupying the Barrett survey lands. Following the initiation of that case, the United States and the Tribe acted on behalf of Defendant Cline.¹⁵⁴ The Federal court restrained the enforcement of the State court's order obtained by "white person" Jackson against "individual Indian" Cline.¹⁵⁵ That stay was contained in the Order of June 5, 1975, Judge McManus presiding.¹⁵⁶

Efforts by Petitioners to violate the congressional will to assist the Indians press their points beyond the realm of reason.¹⁵⁷

¹⁵⁴ See, p. 30, *supra*.

¹⁵⁵ See, Appendix, p. 117.

¹⁵⁶ Appendix, p. 119, at p. 125.

¹⁵⁷ Pet.'s Br., p. 30. Petitioners assert R.G.P., Inc., and the Travelers Insurance Company are not "white persons"—Petitioners might have added but did not that neither of the Corporations are before the Court. Hence, the matter is moot. Petitioners set forth in their Brief this cryptic statement: "White persons have to be flesh and blood—human beings. The individual Petitioners could be white persons." Admittedly, counsel for the Omahas did not ask Petitioners Lakin and Jackson (Wilson did not appear) whether they were white persons. Consequences of interrogation of Petitioners, as to their race, would scarcely have aided application of the spirit and intentment of 25 U.S.C. 194. If these Petitioners are *not* "white persons," it behooves counsel for the Petitioners to so advise the Court.

Unquestionably, the inceptive action—Jackson, a “white person,” against Cline, an Omaha “Indian”—comes squarely within the letter of the language of 25 U.S.C. 194, which states:

“In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other [the latter shall have the burden of proof, as provided by the statute]....”

The litigation has proliferated to a point involving powerful and rich claimants to Indians lands, including the State of Iowa, which was joined by 44 States as *amici curiae*. The imperative need for 25 U.S.C. 194 cannot be better demonstrated. In simplest terms, Congress sought to protect the Indians under the circumstances which prevail here for it referred to “all trials about the right of property....”

In 1790, Congress adopted the first Indian Non-Inter-course Act.¹⁵⁸ The objective was then, as it is now, to prevent the loss of Indian lands through conveyances or otherwise without governmental consent. Justice Marshall alluded to the Act of 1802 and declared that the boundaries of the Indian lands and the rights of the Indian to those lands are “. . . not only acknowledged . . .” by the treaties there involved, but those property rights are “guarantied by the United States.”¹⁵⁹ Chancellor Kent in his commentaries, written contemporaneously with the formulation of the policy to protect Indian property, declared that, where Indian lands are surrounded by a non-Indian population, the non-Indians are “penetrated with a perfect contempt for Indian rights.”¹⁶⁰ Congress recognizes today that the need to protect Indians and

¹⁵⁸ 1 Stat. 137.

¹⁵⁹ *Worcester v. Georgia*, 31 U.S. 515, 556 (1832). See also, App., p. A17; 575 F.2d 629.

¹⁶⁰ 1 Kent's Commentaries, 286 (13th Ed., 1884).

their property from unscrupulous land exploiters is no less pressing now than it was when the Indian Non-Inter-course Act was enacted in 1834, when Chancellor Kent spoke of the white man's amorality regarding Indian property and when Justice Marshall rendered the *Worcester* decision.

5. *Petitioners Would Have The Court Violate, In Regard To 25 U.S.C. 194, The Long-Established Principles of Statutory Interpretation*

Recently, in *Antoine v. Washington*,¹⁶¹ the Court recognized that the United States has a trust obligation not only to “Tribes,” but to “individual Indians.”

The plain reading of 25 U.S.C. 194 rejects the strict construction urged by Petitioners and *amici curiae* alike. That statute relates to “. . . all trials about the right of property in which an Indian may be a party. . . .” [Emphasis added] The probative language of the statute relates to all trials about the right of property in which an Indian may be involved. In seeking to achieve the explicit objectives of Congress, the Court adheres to these principles of construction:

“[The intention of Congress] . . . is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will.”¹⁶²

It would be in clear violation of that expressed principle of statutory construction to adopt the concepts of Pe-

¹⁶¹ 420 U.S. 194 (1975).

¹⁶² *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84, 93-94 (1934).

tioners. If 25 U.S.C. 194 were limited to an "Indian" against a "white person," involving a particular tract of land, the Act would have been nullified immediately upon the death of the Indian. Thereafter, the "Indian" heirs would be required to act to preserve the decedent's property. Hence, it would no longer be an Indian against a white person; it would be several Indian heirs against the white person.

If Petitioners' concepts are adopted, 25 U.S.C. 194 would apply to Raymond G. Peterson, but not to R.G.P., Inc., a corporation comprised of Petitioner's heirs. As remarked above, R.G.P., Inc., petitioned for a Writ of Certiorari, No. 78-162, which was not granted.

It is submitted that Congress, wishing to protect Indians "in all trials," never contemplated that the death of a single white man or Indian would render nugatory 25 U.S.C. 194. Under those circumstances, the Court has rejected the maxims *ejusdem generis* and *expressio unius est exclusio alterius*. It recognized that those maxims are but aids in construction and, when they would nullify the will of Congress, as proposed by Petitioners in connection with 25 U.S.C. 194, they are rejected.¹⁶³

6. Statutes Are To Be Construed Most Favorably For The Indians

Petitioners and *amici curiae* seek to have 25 U.S.C. 194 construed in a manner diametrically opposed to the principles established and long adhered to by the Court in regard to legislation pertaining to Indians. In rejecting the contention that a statute should be strictly construed in regard to the Indians in keeping with the principles generally adhered to, the Court said this:

¹⁶³ Securities & Exchange Commission v. C.M. Joiner Leasing Corporation, 320 U.S. 344, 351, note 8 (1943).

"The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years. . . ." ¹⁶⁴

Numerous decisions, which adhere to that concept, support the contention that statutes of the character involved are not to be construed to the prejudice of the Indians.¹⁶⁵ Most recently, the Court declared:

"The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." ¹⁶⁶

In *McClanahan*, the Court reviewed the concepts of construction and reiterated the controlling precept of interpretation involving Indian legislation:

". . . the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith.'" ¹⁶⁷

There has been long-time adherence to that principle.¹⁶⁸

¹⁶⁴ Choate v. Trapp, 224 U.S. 655, 675 (1912).

¹⁶⁵ Carpenter v. Shaw, 280 U.S. 363, 367 (1930); United States v. Santa Fe Pacific RR. Co., 314 U.S. 339, 353-54 (1941); Intermarriage Cases, 203 U.S. 76, 94 (1906).

¹⁶⁶ Antoine v. Washington, 420 U.S. 194, 199 (1975).

¹⁶⁷ McClanahan v. Arizona, 411 U.S. 164, 174 (1973).

¹⁶⁸ Squire v. Capoman, 351 U.S. 1, 6-7 (1956).

7. *The Court's Recent Nebraska v. Iowa Decision Has No Application Here—Trial Court Applied Nebraska Law*

For reasons not made clear, the trial court applied the laws of Nebraska. Apparently, it relied upon *Nebraska v. Iowa*. Disregarding that fact, Petitioners heavily rely upon presumptions under Iowa law. Relative to those presumptions and the lack of merit in them, is this fact: The trial court, after a full hearing, entered its Order of June 5, 1975, maintaining the Omaha Indian Tribe and the United States in possession.¹⁶⁹

Basically, the conflict in *Nebraska v. Iowa*¹⁷⁰ arose over the vagaries of the Missouri River causing numerous changes of the stream, which had plagued the two States. They adopted an unvarying boundary line—or so they thought—by agreeing that their boundary would be the center of the then-designed channel of the Missouri River as proposed by the United States Corps of Engineers. As the Court points out, the designed channel was never utilized because the work was interrupted by World War II. On the subject, the Court stated: “the channel was redesigned, and by 1959 the River had been confined in the newly designed channel.”¹⁷¹ In 1963, because of the vagaries of the River and of the Compact, it was necessary for the States to have resolved disputes over thirty (30) separate “. . . areas of land, water, marsh or mixture entirely on the Iowa side of the compact boundary.” At issue was whether the lands of the type in question were east or west of the 1943 boundary when those changes took place. The designed channel was limited to 700-800 feet in width. It is impossible to perceive how

¹⁶⁹ Pet.'s Br., pp. 35, *et seq.*; pp. 45, *et seq.*; see, Appendix, pp. 119, 124-25; see App., p. A13; 575 F.2d 628 in re Nebraska law.

¹⁷⁰ 406 U.S. 117, 119 (1972).

¹⁷¹ *Ibid*

the very limited lands there involved could be controlling in these consolidated cases or how it could result in rejecting Federal law and applying Nebraska law to lands entirely within the State of Iowa.¹⁷²

The Court of Appeals correctly recognized that all the issues—the conflict over title to the 2900 acres—arose long prior to the adoption of the 1943 Compact. Specific provisions in the 1943 Compact guaranteed that the “good” title in either State would not, in any way, be affected by the adoption of the amicable arrangement governing the boundary of the two States.¹⁷³ Under the circumstances, the Court of Appeals, most assuredly, did not err when it stated:

“... since the issue concerns who held good title to the land in question prior to 1943, federal law must be applied.”¹⁷⁴

8. *In Error, Petitioners Contend That The “Special Relationship” Between The Tribe And The United States Does Not Justify Applying Federal Law In These Cases*¹⁷⁵

Repeatedly where, as here, title to Indian land and jurisdiction over that land are the predominant issues, the Court has applied Federal law to the exclusion of State law. There is an unvarying line of authority in support of that proposition. Those cases hold that the primacy of Federal law will be recognized and that law applied in the fulfillment of the United States of its

¹⁷² It is to be observed that Petitioners make no reference to the fact that the trial court applied Nebraska law in rendering its decision. See, App., pp. C2, *et seq.*, Memorandum Opinion.

¹⁷³ Iowa Code, 1977, p. LXXIV; Iowa Acts 1943, C306 Nebraska Law 1943, C130 R.R.S. Nebraska 1943, Vol. IIA, Appendix, p. 915, §§ 2 and 3.

¹⁷⁴ See, App., p. A15; 575 F.2d 628.

¹⁷⁵ Pet.'s Br., pp. 46, *et seq.*

unique obligation to the Indians and Indian Tribes including but not limited to the Omaha Indian Tribe.¹⁷⁶

Petitioners' erroneous statements, relative to the Barnum Survey,¹⁷⁷ can, in no way, change the governing principles that Federal law is applicable here, all as has been discussed above.¹⁷⁸ Similarly, the map, appended to Petitioners' Brief, which map was prepared in disregard of proven facts and long after the trial court record in these cases was closed, should, it is respectfully submitted, be ignored. Not only is that map gravely in error, but it has no relationship whatever to the principles of law which are governing here.¹⁷⁹

9. Respondent Omaha Indian Tribe Is Within The Purview Of 25 U.S.C. 194

Stress has been placed upon the fact that the inceptive litigation, giving rise to these cases, came about when "white person" Petitioner Harold Jackson sued "individual Indian" Edward L. Cline seeking to enjoin that "individual Indian" from occupying the 2900 acres comprising the Blackbird Bend Area.¹⁸⁰ That case comes clearly within the explicit language of 25 U.S.C. 194, which includes all trials between an Indian and a white man.

¹⁷⁶ See, *Worcester v. Georgia*, 31 U.S. 515, 549, 556 (1932); *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69 (1974); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Santa Fe Pacific RR. Co.*, 314 U.S. 339, 345, 353-354 (1941); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *McClanahan v. Arizona*, 411 U.S. 164, 174 (1973); *Antoine v. Washington*, 420 U.S. 194, 199 (1975).

¹⁷⁷ See, pp. 4-5, note 2, *supra*, "In error"

¹⁷⁸ See, pp. 60, *et seq.*, *supra*.

¹⁷⁹ See, p. 15, note 24, *supra*.

¹⁸⁰ See, pp. 30, *et seq.*, *supra*; pp. 59, *et seq.*, *supra*.

Congress was fully aware that the Indians, in 1834 when the Act in question became law, did not have the remotest knowledge of the complexities of real property law or the practices and procedures involved in suits to quiet title or to eject trespassers from the land. It was in contemplation of those circumstances that 25 U.S.C. 194 became law.

Manifestly, Congress had no intention—as asserted by Petitioners—that several heirs to land could not invoke the statute. Congress did not intend that 25 U.S.C. 194 would be nullified by a transfer from "white person" Petitioner Lakin to the State of Iowa.¹⁸¹

Congress was well aware in 1834 that Indian Tribes generally were the owners of the lands which they occupied pursuant to treaties. It was likewise aware that Congress had adopted a policy of protecting those Tribes in maintaining their possession and occupancy of land.¹⁸² Additionally, Congress had knowledge that individual Indian ownership was limited. Indeed, the 1887 General Allotment Act¹⁸³ was adopted with one of its objectives being the dispersal of land among individual Indians and thus to weaken tribal ownership and control.¹⁸⁴

Petitioners and *amici* alike complain that 25 U.S.C. 194 is an anachronism relating to an earlier period when the Indians were not well represented or a time when Indians were robbed of their properties.¹⁸⁵ There is no merit to that contention. These cases and the history of them prove the need for protection accorded the Omaha

¹⁸¹ See, pp. 30, *et seq.*, *supra*; pp. 58, *et seq.*, *supra*.

¹⁸² App., p. A22; 575 F.2d 632.

¹⁸³ *Ibid.*

¹⁸⁴ Cohen, *Handbook Of Federal Indian Law*, (1945 Ed.), pp. 207, *et seq.*

¹⁸⁵ See, *amici* State of Indiana Brief, pp. 8-9.

Indian Tribe by 25 U.S.C. 194, all as applied by the Court of Appeals. It is observed in passing that the Court has consistently refused to legislate on the grounds that the acts of Congress were unacceptable by reason of age or otherwise. On the subject, the Court said this in regard to protection of property in which the Nation holds an interest:

"The power over public land thus entrusted to Congress is without limitation. And it is not for the Courts to say how that trust shall be administered. That is for Congress."¹⁸⁶

There has been adherence to that concept where criticism has been directed against the Congress for failing to develop Indian rights to the use of water. In rejecting the criticism, the Court of Appeals for the Ninth Circuit said this:

"We deal here with the conduct of Congress as trustee for the Indians. It is not for us to say to the legislative branch of the government that Congress did not move with sufficient speed. . . ."¹⁸⁷

It is respectfully submitted that the only reasonable interpretation of 25 U.S.C. 194, which pertains to ". . . all trials about the right of property . . ." is to declare, as did the Court of Appeals, that the cases of the character here involved include the Omaha Indian Tribe. Here the Tribe is acting not only to protect the individual Indian Edward L. Cline, but it is likewise acting to protect each and all of the Indians of which it is comprised. It would be, indeed, an anomalous circumstance if the Tribe, when acting for its members, would

¹⁸⁶ United States v. City and County of San Francisco, 310 U.S. 16, 29-30 (1940).

¹⁸⁷ United States v. Ahtanum Irr. Dist., 236 F.2d 321, 329 (CA 9, 1956); *cert. den.* 325 U.S. 988 (1957).

be denied the right to invoke 25 U.S.C. 194 on their behalf, as was done in these cases.¹⁸⁸

D. The Court Of Appeals Was Correct In Its Analysis Of The Law Governing Accretions And Avulsions In These Cases

Extended review has been made of "The basic finding essential to the defendant's case. . . ." ¹⁸⁹ That finding was, indeed, essential to Defendant's case. Involved were the affirmative defenses that Petitioners failed to sustain: (1) The obliteration of Blackbird Bend and (2) the restoration of it by accretions to the Iowa bank.¹⁹⁰ In rejecting out of hand that finding by the trial court, the Court of Appeals, based upon its complete analysis of the record stated:

"We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence."¹⁹¹

As pointed out above, the rejected finding was predicated upon the "educated guesses", the preferences and expectations of those witnesses rather than by any evidence.

As part of its analysis of the law in these cases, the Court of Appeals made an in-depth review of the prin-

¹⁸⁸ See, p. 74, *supra*.

¹⁸⁹ App., p. A39; 575 F.2d 639. See, pp. 50, *et seq.*, *supra*.

¹⁸⁹ App., p. A39; 575 F.2d 639. See, pp. *supra*.

¹⁹⁰ The finding, essential to the Defendant's case, was quoted by the Court of Appeals and is as follows:

"The basic finding essential to the defendant's case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area . . . ' 433 F.Supp. at 88." See, App., A39; 575 F.2d 639.

¹⁹¹ App., pp. A39-A40; 575 F.2d 639.

ciples governing accretions and avulsions.¹⁹² That review of the law of accretion and avulsion by the Court of Appeals was principally background toward ultimate rejection of the finding by the Court for the reasons reviewed above. The Appellate Court was imminently correct in declaring that the trial court was in error in concluding that the Blackbird Bend Oxbow was obliterated and it was equally in error in declaring that the 2900 acres were replaced "under the sky" by accretions.

As reviewed above, the Omaha Indian Tribe introduced conflicting evidence which overcame the presumption, under the Iowa law, that the River moved by erosion and accretion, rather than by avulsion. As the Tribe overcame that presumption, the burden was fully upon the Petitioners to prove erosion and accretion and for the reasons expressed above, the "finding essential to the defendant's case" was and is "clearly erroneous."

On that background, reference will now be made to the Brief filed by Petitioner State of Iowa and the *amici curiae* who filed briefs in support of the State.

¹⁹² App., pp. A25, *et seq.*; 575 F.2d 633. The Court of Appeals has summarized its objections to the conclusions of the trial court in regard to the issue of what facts may be utilized to prove an avulsion. On the subject, the Court of Appeals said this:

"In the present case the plaintiffs claim that a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion. We therefore conclude that it was error for the trial court to reject the plaintiffs' legal theory in its evaluation of the evidence." (App., pp. A38-A39; 575 F.2d 637-638.)

IOWA'S STATUS IS ANOMALOUS: IT RAISES ISSUES HERE FOR THE FIRST TIME ¹⁹³

This is not the ordinary clash between sovereigns over the title and jurisdiction of the bed of navigable streams. Here, the State of Iowa traces its title to "squatter" Joseph A. Kirk, source of title for all Petitioners with the exception of Petitioner Harold Sorenson. Quit claim deeds from Petitioners Lakin and Raymond G. Peterson, whose heirs, upon his demise, organized a corporation using Peterson's initials for its name, are the immediate predecessors in interest of the State of Iowa.¹⁹⁴ Simply stated, Petitioner Iowa's title can rise no higher than that of "squatter" Kirk. As reviewed above, a Writ of Certiorari was granted ¹⁹⁵ in regard to Iowa's question "4," which is as follows:

"Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries." ¹⁹⁶

Yet, reference is not made by Iowa in its Brief to that question. Indeed, the State of Iowa, while ignoring the question for which it petitioned *certiorari*, likewise ignores the source of its title and makes no reference to the deeds from Petitioner Lakin and R.G.P., Inc., to which reference has been previously made.

Iowa, rather than referring to the question it presented for review, raises for the first time in the Court

¹⁹³ P. 25, *supra*, "Squatter" Joseph A. Kirk Is Principal Source Of Title For Petitioners Wilson, Lakin, Jackson (Wilson's Lessee)—Not Patents As Asserted. See, in particular, p. 28, *supra*, Petitioner State Of Iowa Traces Its Title To "Squatter" Joseph A. Kirk.

¹⁹⁴ Pp. 26-27, particularly note 50, *supra*. As reviewed above, R.G.P., Inc., No. 78-162, petitioned the Court for a Writ of Certiorari, which was not granted.

¹⁹⁵ See, pp. 27-28, *supra*.

¹⁹⁶ *Ibid.*

issues which are most critical. Iowa refers to the fact that it was admitted into the Union in 1846,

"... on an equal footing with the original thirteen states, and it then acquired sovereignty and ownership over the bed and banks of the Missouri River...."¹⁹⁷

Iowa further alleges, adhering to the same rationale as that just quoted, that

"There can be no serious dispute that Iowa owns the bed of the Missouri River within its boundary in the disputed area, together with islands formed therein after 1943."¹⁹⁸

The Tribe denies the quoted claim of Iowa "in the disputed area." It concedes, in general, the proposition that States own the beds of navigable streams.

The sole and only evidence offered by the State of Iowa relates to the land, title to which Iowa traces to "squatter" Kirk. The Frontispiece reveals and an abundance of evidence proves this undeniable fact: Within the area of litigation, the channelized Missouri River with its artificial beds and banks presents issues concerning which Iowa offered no evidence in support of its claims to the bed of the stream or to the islands "in the disputed area."

Iowa adopted *en toto* the very extensive evidence offered by Petitioners Wilson, Lakin and Jackson. That evidence did not in any way support the quoted allegations taken from Iowa's Brief and set forth above.

In support of the Tribe's opposition to the efforts of Iowa to raise new issues for the first time at this juncture in the proceedings, reference is made to the Court's Rule 40. That Rule is explicit as it pertains to the circumstances here presented:

¹⁹⁷ Iowa's Brief, p. 22.

¹⁹⁸ *Ibid.*, at p. 27 (emphasis added).

"... the brief may not raise additional questions or change the substance of the questions already presented in those documents [the jurisdictional statement or the Petition for Certiorari]. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."¹⁹⁹

In applying the last quoted rule, the Court said:

"This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari. . . . Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here."²⁰⁰

Most recently, the Court rejected "... bare assertions . . . raised by petitioners for the first time before this Court."²⁰¹

It is respectfully submitted that in reference to Iowa's claims, in regard to the "disputed area," concerning which no evidence was offered by Iowa at the trial, concerning which no trial court findings were entered and concerning which no reference was made by Iowa to the Appellate Court, Iowa may not raise those issues for the first time here. As repeatedly stated, Iowa's only offer of evidence—and the only right which it has any grounds for claiming—is to those lands conveyed to it by Petitioners Lakin and R.G.P., Inc., who trace their title to "squatter" Kirk. Under no circumstances should these crucial issues, which directly affect the interests of

¹⁹⁹ Rules of the Supreme Court, Rule 40. Briefs—in general, 1(d)(2).

²⁰⁰ *Neely v. Eby Construction Co., Inc.*, 386 U.S. 330, 381 (1967).

²⁰¹ *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 235 (1976).

the Omaha Indian Tribe be presented here for the first time. The Court is respectfully petitioned to adhere to the clear statements of the Rule, to which reference has been made above.

Iowa's Brief is largely repetitious of the assertions by Petitioners Wilson, *et al.*, and responses have already been made to them. For example, Iowa speaks of the presumption of accretion under Iowa law. That presumption was rebutted by the Tribe.²⁰² Iowa, contrary to fact, asserts that the 2900 acres has always been in Iowa. That is untrue. The Compact changed the boundary and, at that time, the lands were within the exterior boundaries of the State of Iowa.

Iowa cites *Nebraska v. Iowa*.²⁰³ That case is irrelevant.²⁰⁴ Iowa adopted the record made at the trial by Petitioners Wilson, Lakin and Jackson. The trial court adopted Petitioners' findings. The Court of Appeals ruled those findings to be "clearly erroneous."²⁰⁵ Iowa joined in claiming that the Blackbird Bend Oxbow had been obliterated. It was not. Iowa asserted and adopted the record to prove that the Blackbird Bend lands were replaced by accretions. They were not. Iowa claims title from "squatter" Kirk. Kirk's title failed—and so did Iowa's. Iowa offered no proof of ownership of any islands in the bed of the Missouri River within the disputed area or ownership of the bed of the stream. Iowa may not raise these issues for the first time here.

²⁰² App., A24, note 22; 575 F.2d 632, 633; pp. 46, *et seq.*, *supra*.

²⁰³ 406 U.S. 117 (1972).

²⁰⁴ See, p. 72, *supra*.

²⁰⁵ See, p. 54, *supra*. See, App., p. A23, note 21; A39, VI; A41-A42; A39-A40, "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence"; A56, "There exists no factual predicate whatsoever to support this [trial court's] conclusion"; A65, "We conclude . . . [from the record] that it is entirely speculative to determine when and how the thalweg moved

Iowa Substitutes A New Question In Lieu Of That Concerning Which The Writ Of Certiorari Was Granted

Reference has been made above²⁰⁶ to the fact that Petitioner Iowa's Brief does not mention question "4," concerning which a Petition for Certiorari was filed or concerning which a writ was granted. Iowa, rather, appears to request a review of this proposition:

"Whether the Court of Appeals' decision violates established principles of Federalism."

As reviewed above, the Court's Rule No. 40 precludes that course of conduct.²⁰⁷

Iowa Complains That 25 U.S.C. 194 Does Not Apply To It

Iowa declared that it is not within the purview of the Act.²⁰⁸ What Iowa does not refer to is an element that is most pertinent here: "White person" Petitioner Jackson initiated a case against the Omaha Indian Tribe. That action precipitated the proceedings that are here before the Court.²⁰⁹ Petitioners Wilson and Lakin, "white persons," joined Jackson in the litigation stemming di-

to the position shown on the 1923 map"; A44, "We find the evidence concerning bar C to be highly conjectural and inconclusive . . ."; A45, ". . . we regard the evidence of the defendants as insubstantial." A46, "Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility." A47, "Defendants' experts also relied upon inferences . . . The record, in our judgment, requires us to give little or no probative effect to the ultimate conclusion reached from these factual premises." A49, note 49. A59, The Court below made reference to the fact that a principal witness of the Petitioners conceded that the conclusions expressed were "educated guesses." A65, "The essential inferences cannot be left to speculation or conjecture." (575 F.2d 633; 640; 639; 646; 650; 641; 641-2; 642; 642; 643; 648; 650).

²⁰⁶ See, p. 28, *supra*.

²⁰⁷ See, pp. 80-81, *supra*.

²⁰⁸ Pet. Iowa's Br., pp. 11, *et seq.*

²⁰⁹ See, pp. 30, *et seq.*, *supra*.

rectly from the proceedings by Jackson against Cline. Iowa was necessarily named a party to the proceedings because the records showed that it was claiming adversely to both the United States and the Omaha Indian Tribe. It would be, indeed, an anomalous situation if 25 U.S.C. 194, having been enacted for the benefit of the Omaha Indian Tribe, could be defeated by the simple transfer of title to the State of Iowa. That implausible consequence should not be permitted to occur for to do so is tantamount to the abrogation of the will of Congress to protect the Indians in their title to their lands, all as reviewed in detail by the Court of Appeals.²¹⁰

Iowa asserts that it is not a "white person" and the Omaha Indian Tribe is not an "Indian" within the purview of 25 U.S.C. 194. Response to Iowa's challenge as to 25 U.S.C. 194 has been reviewed in detail above.²¹¹ Iowa and all other Petitioners rely heavily upon the *Perryman* case.²¹² That decision, whatever its merits on the facts there presented, has no bearing on these consolidated cases. In that connection, there has been reviewed above the fact that Congress has the power to protect the Indians in their ownership and possession. It did so in regard to ". . . all trials about the right of property . . ." in which an Indian may be involved. It most assuredly, as stated, does not preclude the United States from appearing on behalf of an "Indian." Similarly, the Tribe may appear on behalf of an "Indian" involved in litigation of that character. It is unquestioned that the Tribe and the United States created a presumption of title of the Indians by the fact of previous possession and ownership.²¹³ Quite obviously, there

²¹⁰ See, p. 64, *supra*, 25 U.S.C. 194—*An Appropriate Exercise of Authority By The Congress Of The United States And Correctly Interpreted By The Court Of Appeals.*

²¹¹ See, p. 64, *supra*.

²¹² *United States v. Perryman*, 100 U.S. 235 (1880).

²¹³ See, App., p. A25; 575 F.2d 633.

was a compelling governmental interest in the United States protecting the Indians in their possession of the 2900 acres.

Congress did not have an intention to limit the benefit of 25 U.S.C. 194 to a single Indian when it referred to "all trials". Manifestly, "all trials" will include complex, multi-party/multi-issue case of the character involved in these consolidated cases.

On the subject, the manner in which a statute should be read involving either the States or the United States, the Court declared:

"Is the United States a resident within the meaning of the words 'residents, corporate or otherwise'? We think it is. It many times has been held that the United States or a *state* is a 'person' within the meaning of statutory provisions applying only to persons. . . . in *Stanley v. Schwalby*, 147 U.S. 508, 514 . . . it was held that the word 'person' used in the statute there under consideration would include the United States 'as a body politic and corporate.'"²¹⁴ [Emphasis supplied]

Manifestly, 25 U.S.C. 194 was intended to protect Indians in all trials involving their ownership and possession of their lands. Under the circumstances, the Court has regularly sustained acts of that character, particularly in regard to Indians where the principles of construction are to rule favorably for the Indians and never to their prejudice.

²¹⁴ *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84, 91, 92 (1934).

**RESPONSE TO BRIEF OF AMICI CURIAE
IN SUPPORT OF THE STATE OF IOWA
FILED BY THE STATE OF INDIANA AND OTHERS**

It is clear that the State of Indiana and other States, which joined Indiana as *amici curiae* supporting Iowa, proceeded upon some very basic misconceptions, all as reflected in their Brief. Let this fact be respectfully emphasized: The Omaha Indian Tribe has not trenched upon Iowa's sovereignty. Iowa's claims to the bed of the Missouri River, concerning which Iowa raised no issue at the trial or on appeal, is presented for the first time here without any facts in support.²¹⁵

The case between the Omaha Indian Tribe and the State of Iowa is unique. Iowa claims title to the lands involved in these proceedings from "squatter" Kirk, from whom all other Petitioners, with the exception of Petitioner Sorenson, deraign their titles. There is no denial by the Tribe that, under appropriate circumstances, Iowa does, in fact, own the bed of the stream to the center of the thalweg. That issue is not here involved.²¹⁶

Great stress has been placed upon the interpretation by the Court of Appeals of 25 U.S.C. 194. It is the position of the Omaha Indian Tribe that there is the primacy of Federal law in these cases and that 25 U.S.C. 194 is an appropriate exercise of that law. It is further the position of the Tribe that the Court of Appeals is imminently correct in its interpretation of 25 U.S.C. 194. An overriding factor, however, ignored by Iowa and all Petitioners is this: The State of Iowa joined Petitioners in affirmative defenses declaring that the lands originally owned by the Omaha Indian Tribe had been washed away and completely replaced by accretions to the Iowa shore.

²¹⁵ See, p. 79, *supra*.

²¹⁶ *Ibid*.

Thus, Iowa had the burden of proving those facts and it failed to sustain that burden.²¹⁷

It is manifest that the *amici curiae* were wholly unaware of the factual background, particularly in regard to the circumstance where the claims of Iowa were predicated upon title from a "squatter" rather than on the basis of a sovereign claim to the bed of the Missouri River. As a consequence, the States have presented to the Court issues which are not germane to these proceedings.

There has been reviewed in depth above the long-standing principles of jurisprudence that bring the issues here before the Court within the province of Federal law.²¹⁸ Additionally, the *amici curiae* complain about the interpretation of 25 U.S.C. 194. Nevertheless, it is clear beyond question, predicated upon the criterion for construing Indian statutes, that the Court of Appeals was imminently correct in applying 25 U.S.C. 194 to Petitioners in these cases.²¹⁹

**RESPONSE TO AMICI CURIAE—
CALIFORNIA AND OTHERS**

California and the States joining it, hereafter referred to as California, in the *amici curiae* Brief proceed upon misconceptions as to the status of Iowa. California, as its Brief discloses, invisions a violation of the sovereignty of the State of Iowa in regard to the bed of the Missouri River. Similarly, California reflects a concept that, in some manner, the lands here involved claimed by the

²¹⁷ See, p. 50, *supra*.

²¹⁸ See, p. 60, *supra*, *The Laws Of The United States Govern Where, As Here, The Issue Is "Whether" Title To The Blackbird Bend Oxbow Passed Out Of The Omaha Indian Tribe And The United States*.

²¹⁹ See, p. 54, *supra*.

State of Iowa stem from that State's sovereignty. That, of course, is not the circumstance. The State of Iowa simply participated in dividing up the Indian lands that had been trespassed upon by "squatter" Kirk. It has no claim based upon the ownership of the bed of the stream, nor did it offer any evidence in support of that claim.²²⁰

Throughout California's Brief, there are implications that, in some manner, a boundary dispute was not involved. That is, of course, totally incorrect. The center of the Missouri River was the boundary between the Omaha Indian Reservation and the State of Iowa throughout the whole time when the River was moving. As repeatedly pointed out above, the Iowa-Nebraska Compact in no way affected "good title" at the time the arbitrary boundary compact arrangement was entered into. The question is title stemming from river movement during the time when the boundary was the center of the stream. Failure to take cognizance of that fact gives rise to extended, but irrelevant, comments by California.

California likewise ignores the fact that Federal law controls where, as here, the issue is "whether" title had passed from the Omaha Indian Tribe by reason of alleged river action. That Petitioners, who assumed the burden of proof by their affirmative defenses, failed to sustain that burden eliminates most of the arguments presented by California.²²¹

²²⁰ See, pp. 79, *et seq.*, *supra*.

²²¹ See, pp. 50, *et seq.*, *supra*.

**RESPONSE TO TITLE INSURANCE AND TRUST
COMPANY, PIONEER NATIONAL TITLE INSURANCE
COMPANY AND AMERICAN LAND TITLE
ASSOCIATION, AMICI CURIAE**

It is clear that these *amici curiae* have proceeded upon the same erroneous concepts as did the other *amici*, to which reference has been made. They do not take cognizance of the fact that the claims of the State of Iowa are predicated upon and traced back to a "squatter" on the lands claimed by the Omaha Indians. 25 U.S.C. 194, while placing the burden of proof upon Petitioners, was no more onerous than the burden Petitioners had to assume—to sustain their affirmative defenses.²²² Undoubtedly, if the States and other *amici curiae* had comprehended the factual situation here present, they would not have attempted to participate in this litigation.

CONCLUSION

Petitioners are here seeking a second appellate review in regard to issues which were fully considered and passed upon by the Court of Appeals which declared, after that review, that all of the crucial findings of the trial court were "clearly erroneous." That Appellate Court ruling stemmed from the fact that the findings, prepared by Petitioners and adopted verbatim by the trial court, were unsubstantiated, arose from testimony which was purely speculative; that the conclusions were conjectural and without foundation in fact.

Petitioners had pleaded affirmative defenses and had assumed the burden of proving those defenses by elaborate—albeit, speculative—testimony to support those affirmative defenses and prayed that judgment be entered in their favor. The trial court granted their prayer for relief predicated upon the findings, which the Court of

²²² See, p. 58, *supra*.

Appeals ruled were "clearly erroneous" and, for that reason, reversed the trial court.

In its opinion, the Court of Appeals declared that there must be adherence to Federal law because the subject matter of the cases was the title to lands claimed by the Omaha Tribe, pursuant to the Treaty of 1854. Additionally, said the Appellate Court, the Federal laws were applicable because an interstate boundary line was in dispute at the time the conflict arose. Accordingly, the Court of Appeals, pursuant to 25 U.S.C. 194, placed the burden of proof upon Petitioners. In light of the facts here presented, that statute is applicable. Moreover, the burden was voluntarily assumed by Petitioners. They did not sustain it. Accordingly, the Court of Appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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In the Supreme Court of the United States

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OCTOBER TERM, 1978

ROY TIBBALS WILSON, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE
UNITED STATES OF AMERICA

STATE OF IOWA, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE
UNITED STATES OF AMERICA

No. 78-161

STATE OF IOWA, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE
UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A67)¹ is reported at 575 F.2d 620. The opinions

¹ "Pet. App." refers to the separately bound Appendix to the petition in No. 78-160.

of the district court (Pet. App. B1-B61, C1-C21) are reported at 433 F. Supp. 67 and 57.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1978. A timely petition for rehearing was denied on May 2, 1978 (A. 188-189). The petitions for a writ of certiorari were filed on July 28, 1978. The petitions were granted on November 13, 1978, and the cases were consolidated (A. 189-190). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

25 U.S.C. 194 provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether 25 U.S.C. 194, which applies to property actions between "an Indian" and "a white person," is applicable to this action brought by an Indian tribe and the United States (as trustee for the tribe and holder in trust of its lands) against non-Indian individuals, corporations, and the State of Iowa.

2. Whether the court of appeals erred in applying federal common law rather than state common

law to determine the boundary of the Omaha Indian Reservation.

STATEMENT

These consolidated actions were brought by the Omaha Indian Tribe and the United States as trustee for the Tribe pursuant to 28 U.S.C. 1331, 1345, and 1362 to quiet title to lands on the east bank of the Missouri River. As trustee for the Tribe, the government claimed title to an area that had been surveyed as part of the Tribe's reservation on what was then the west bank of the Missouri in 1867 (the "Barrett survey area"), excluding from its claim lands within this area that were subsequently allotted to members of the Tribe and sold to non-Indians (A. 61-62). Presently at issue are some 2,900 acres.²

The Omaha reservation was established pursuant to a treaty signed in 1854. Treaty of March 16, 1854, reprinted at 10 Stat. 1043. In Article 1 of the treaty (10 Stat. 1043) the Tribe ceded to the United States its lands "west from a point in the centre of the main channel" of the Missouri, reserving "for their future home" lands acceptable to the Tribe not to exceed 300,000 acres. In 1855 the Tribe selected the Black Bird Hills area in the Nebraska Territory on

² The Tribe filed two actions that claimed a total of approximately 11,000 acres (A. 100-118, 139-149). A map showing the areas claimed by the Tribe, as well as the Barrett survey area, is reprinted at A. 148. Because the Tribe's claim included the 2,900 acres at issue in the government's suit, the three cases were consolidated, and the Tribe's claim for approximately 8,000 additional acres was severed for later consideration (Pet. App. B5).

the west bank of the Missouri River as the site for their reservation (A. 266, 270-274). The boundary of the reservation was the center of the main channel of the Missouri River (A. 268-270; Pet. App. B3, A6 & n.5).³ In 1867 T. H. Barrett of the General Land Office surveyed the reservation, and his survey showed that the reservation included a substantial peninsula jutting east toward the Iowa side of the river (see Plate I, Pet. App. A10), around which the river then flowed in an ox-bow curve known as Blackbird Bend. The 2,900 acres claimed by the United States are bounded by the Barrett survey line on the north, east, and south, and by the present boundary between Iowa and Nebraska on the west.⁴

It is generally agreed that the river changed its course a number of times between 1867 and 1923, sometimes moving eastward and sometimes to the west (Pet. App. A7-A9). Since at least 1927, the river has been west of its 1867 position, leaving much

³ When Nebraska became a state in 1867, the thalweg also became the political boundary between Nebraska and Iowa. In 1943 this boundary was fixed independent of the river's movements by the Iowa-Nebraska Boundary Compact, ratified by the Act of July 12, 1943, ch. 220, 57 Stat. 494.

⁴ All of the 2,900 acres claimed by the United States are on the Iowa side of the boundary established by the interstate compact, see note 3, *supra*, and thus venue was properly laid in the United States District Court for the Northern District of Iowa. Another portion of land included within the Barrett survey also lies east of the current bed of the Missouri River, but it is on the Nebraska side of the boundary established by the interstate compact. See the map reprinted at Pet. App. F1. That area is not at issue in the instant case.

of the Barrett survey area on the Iowa side of the river, separated from the remainder of the reservation. As this tract gradually dried out, Iowa residents began to claim the land and to farm it.

The petitioners in No. 78-160 are farmers, or successors in claim of title to farmers, who had possession of much of the land until 1975, when the Tribe took possession (Pet. App. A4).⁵ The petitioner in No. 78-161 is the State of Iowa, which claims title to the bed of the Missouri River between the thalweg and the ordinary high water mark, any islands growing out of that portion of the river, and any abandoned channels (A. 90, 152-153).

The primary factual dispute concerned the nature of the river's movements in two periods. Between 1875 and 1879, the thalweg, or center of the main channel of navigation, shifted nearly 6,000 feet to the west, and as much as two-thirds of the Barrett survey area was covered by water at the high flood stage (Pet. App. A8). The Missouri River Commission map of the river in 1879 is reprinted at Pet. App. A11. The parties agreed that subsequent to 1879 the river moved a substantial distance to the north and east, as depicted in the sketch of the river at the northerly high bank reprinted at Pet. App.

⁵ The district court granted a preliminary injunction permitting the Tribe's continued occupancy during the pendency of the litigation and requiring an accounting of profits (Pet. App. A4, B4-B5). The court of appeals entered a stay continuing that injunction while the appeal was pending (Pet. App. A4). Having prevailed in the court of appeals, the Tribe remains in possession.

A12. The second disputed period was between 1912 and 1923, when the river moved south and west; by 1923 almost the entire peninsula described in the Barrett survey had been cut off by the river's movements (Pet. App. A9).⁶ The location of the river in 1923 is depicted in the Corps of Engineers map reprinted at Pet. App. A12.

The government and the Tribe contended that the river's movements had been avulsive, and, accordingly, that the change in the location of the river had not affected the boundary of the reservation. Petitioners contended that the river had gradually eroded and washed away the reservation lands on the west bank of the river, and that the land on the east bank was new land formed by gradual accretion to the riparian lands (see A. 67, 70, 73-74, 75, 81-83, 130, 132-134, 154, 158-159, 165-166). On this theory, petitioners counterclaimed, seeking to quiet title in their own names (A. 79-80, 87, 92-93, 138, 155, 162, 170-173-175).

The district court first considered the choice of law question. Although petitioners contended that Iowa law applied, and the government and the Tribe contended that federal law applied, the trial court concluded that under *Nebraska v. Iowa*, 406 U.S. 117

⁶ Regardless whether the movement of the river between 1875 and 1879 was characterized as accretion or avulsion, the nature of the river's subsequent movement between 1912 and 1923 was pertinent to at least the southwestern portion of the Barrett survey area, which remained in tribal ownership in 1879 under either theory (see the 1879 map, Pet. App. A11), but would have been affected by the river's movements between 1912 and 1923 (compare the 1923 map, Pet. App. A12).

(1972), Nebraska law governed river changes prior to 1943 (Pet. App. C3-C8). Under Nebraska law, the court concluded (Pet. App. C15) that the burden of persuasion is on the party seeking to quiet title, who must show the strength of his own title, not the weakness of conflicting claims. The court rejected the government's contention that the burden of proof was governed by 25 U.S.C. 194, which is applicable to property actions where an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." The court concluded that the statute would be applicable only if respondents could show that the land in question is land "left undisturbed and in place through and following an avulsive change of the river channel," rather than new land accreted to the land on the Iowa side of the river (Pet. App. C18-C19). Of course, once respondents established that, there would be no need for resort to the statutory presumption.

The district court concluded (Pet. App. C14) that under Nebraska law "the key indication of an accretion is erosion, [while] the key indication of an avulsion is that the land which is displaced in relation to the river, or remains while the river displaces itself, can be identified as the same piece of land as existed before the change." Acknowledging that "the *crucial* factual issues in dispute are relatively few," and that the definitions of the terms accretion and avulsion are "at the core of this litigation" (Pet. App. B53), the district court concluded that the river changes during the relevant periods were accretive in nature

(Pet. App. B26-B29, B33-B45, B49-B51).⁷ It found that the river's "migration eroded almost all of the westerly end of the land as surveyed by Barrett in 1867 and the deposition which occurred during the southerly migration of the river was accretion to the northerly and easterly high banks and thereby became accretion to the Iowa riparian owners" (Pet. App. B44-B45). Accordingly, the court quieted title in petitioners "to the Barrett Survey land in controversy" (Pet. App. B60).

The court of appeals reversed, finding that the district court's ruling was marred by three fundamental errors (Pet. App. A1-A67). First, the court held (Pet. App. A13-A20) that the district court had

⁷ The district court pointed out that in reaching this conclusion it had not applied the government's definition of avulsion (Pet. App. B56):

The government's theory would compel us to recognize "jumps" (*Ergo* avulsions) under many other circumstances. If the thalweg were hard against one bank of a river prior to an inundation and subsequent to the inundation appeared suddenly at another place in the river, the government's theory would no doubt necessitate the conclusion that an avulsion had occurred in view of the obvious fact that the thalweg had moved suddenly, in a few hours or a few days, to a new location.

That idea of an avulsion is innovative and thought-provoking but it cannot be reconciled with the common law legal concepts which we discussed earlier in this opinion. The government's criterion for recognizing an avulsion, a sudden movement of the thalweg, is inadequate to provide the conceptual framework for the resolution of this dispute if the Court adheres, as it must, to the common law concepts of accretion and avulsion.

erred in applying Nebraska law rather than federal law in evaluating the facts of the case. It concluded (Pet. App. A13-A15) that because the boundary of the reservation at the times in question was coincidental with the interstate boundary, it should have been determined in accord with the body of federal common law dealing with boundaries of states and other political jurisdictions. Moreover, the court pointed out that the Tribe asserted a right to the reservation arising under and continually protected by federal law (Pet. App. A15-A20). Under *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Court concluded that, absent a federal statute making state law applicable, federal law was controlling since state law cannot extinguish Indian title to tribal lands.

Second, the court of appeals concluded that the district court improperly placed the burden of persuasion on the Tribe (Pet. App. A20-A25). Congress's longstanding protectionist policy with regard to Indians is expressed in 25 U.S.C. 194, which places the burden of proof on a party seeking to divest an Indian of title to land. Since the Tribe had proved that the area depicted in the Barrett survey was originally within the reservation, petitioners had the burden of persuading the court that the Indians had been divested of their title.⁸

⁸ The court of appeals noted (Pet. App. A24, n.22) that under Iowa law there is a presumption in favor of accretion, that there is no such presumption under Nebraska law, and that whether such a presumption exists under federal law is

Finally, applying federal law, the court of appeals concluded that the district court had based its ruling on too narrow a definition of avulsion, erroneously "focus[ing] on identifiable land in place as the sole criterion of avulsion" (Pet. App. A27).⁹ Emphasizing that the rationale for the doctrine of avulsion is mitigation of the hardship that would otherwise flow from a shift in title caused by sudden river movements (Pet. App. A35-A37), the court concluded (Pet. App. A38-A39) that

the critical determinant of avulsion is a sudden perceptible shift of the channel. Only where the thalweg gradually moves through the intervening land as a direct consequence of erosion and the imperceptible process of accretion to the forming bank do the policies underlying the accretion and avulsion rules justify altering permanent land boundaries to conform with the gradually changing thalweg. [Footnote omitted; emphasis in original.]

uncertain. But it concluded (*ibid.*) that "[t]he existence of a presumption of accretion, however, does not affect the outcome here," because the Tribe had presented sufficient opposing evidence on the issue of accretion to cause any presumption to lose its vitality. See Fed. R. Evid. 301.

⁹ The court of appeals concluded that in the circumstances of this case the absence of certain proof of identifiable land in place through the relevant periods had little probative value. The river had moved at times of extremely high water that inundated large areas that would normally have been dry land, and inferences drawn from the land forms shown on maps prepared during those periods would "be highly conjectural" (Pet. App. A45-A47, A62-A63).

The court of appeals then conducted an extensive review of the testimony and exhibits regarding the river's movements from 1875 to 1879 and from 1912 to 1923 (Pet. App. A39-A67). It concluded (Pet. App. A65; footnote omitted):

When considered in the context of the broader parameters of avulsion we hold the [petitioners'] case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the circumstances, we hold that the [petitioners] have failed in sustaining their burden of proof under § 194.

SUMMARY OF ARGUMENT

I.

Petitioners raise a number of questions about the proper construction of 25 U.S.C. 194, which provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Section 194 is one of a group of statutes—popularly called Nonintercourse Acts—enacted in the late 1700's and early 1800's to protect Indian interests and particularly Indian land rights. The first Nonintercourse Act, adopted in 1790, provided that no conveyance

of land by an Indian tribe would be valid unless made by treaty (Section 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138), and each of the subsequent acts contained a similar provision. The Nonintercourse Acts also prohibited non-Indians from making settlements on lands belonging to an Indian tribe, and authorized force to remove persons violating that restriction.

The legislative precursor of Section 194 was an 1822 amendment to the Nonintercourse Act then in force. The 1822 amendment was incorporated, with slight changes in language, as Section 22 of the Nonintercourse Act adopted in 1834, and was subsequently codified as 25 U.S.C. 194.

The 1822 amendment and the resulting Section 194 increased the protection afforded Indian lands by placing the burden of proof on non-Indians who claim title to lands or other property previously in the possession or ownership of Indians. Because Section 194 was intended to protect Indians, its interpretation must be guided by the settled rule that requires measures protecting Indians to be liberally construed, and doubtful expressions resolved in favor of the protective policy. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

A. The first question petitioners pose is whether Section 194 may be invoked in a suit brought by a tribe, or by the United States as trustee for a tribe or for individual Indians. Petitioners argue that because Section 194 refers to suits in which "*an Indian* may be a party on one side," it has no application to a suit

brought by any entity other than an individual Indian.

To construe Section 194 as applicable only where an individual Indian is formally a party would be inconsistent with Congress's broad protective policy, which seeks to shield Indian lands from dubious claims by non-Indians regardless of who is the formal party to the suit. If Section 194 were not applicable to claims by a tribe, it would have little value in protecting Indian trust lands, which typically are held communally by the tribe and not by individuals. Congress could hardly have intended its policy to be so readily frustrated by procedural technicalities, and the rule that ambiguities should be resolved in favor of Indian interests further indicates that such a restrictive interpretation should be rejected.

Petitioners argue that in narrowing the language of the 1822 amendment, which referred to suits by "Indians," to the language used in Section 194, which refers to suits by "an Indian," Congress deliberately sought to exclude tribal claims from the scope of Section 194. The argument ignores the rule of construction of the United States Code, enacted as 1 U.S.C. 1, that unless the context indicates otherwise "words importing the singular include and apply to several persons, parties, or things." It also ignores the fact that the 1822 provision shifted uncomfortably between singular and plural nouns, and that the 1834 version—now codified as Section 194—simply resolved the internal conflict by using singular terms throughout the Section. There is no legislative

history indicating an intent to make any substantive change in the Section, and petitioners' attempt to ascribe such effect to the shift from the plural to the singular falls far short of justifying a narrow reading of a provision intended to benefit the Indian people.

B. The second question petitioners raise concerns the interpretation of the term "white person" in Section 194. They contend that it refers only to individuals of the Caucasian race, and has no application to individuals of other races or to corporations or states. Interpreting the phrase "white person" to refer only to individual Caucasians would defeat the purpose of the statute, since Caucasians could avoid it by simply forming a corporation through which to conduct dealings with Indians. And the statute would provide no protection at all against the claims of non-Caucasians.

There is nothing in the 1834 Act itself or its legislative history to show that Congress intended "white person" to mean anything other than non-Indian—so as to shield Indian property from dubious non-Indian claims. In various sections of the 1834 Act Congress used the terms "white person" or "white people" in contexts where they plainly refer to all non-Indians. The same is true in Section 194.

As petitioners point out, in some portions of the 1834 Act other phrases were used to refer to non-Indians. But this reflects nothing more than the amalgamation in the 1834 Act of various Indian statutes enacted over a number of years, with result-

ing differences in phraseology from section to section. The omnibus character of the 1834 Act also explains why the Court's ruling in *United States v. Perryman*, 100 U.S. 235 (1880), interpreting the term "white person" in another section of the Act, is not controlling here. The *Perryman* decision was grounded on the unique legislative history of the provision in question, which the Court found had been added to exclude fugitive slaves. There was no similar legislative aim here.

There is an additional and compelling reason for interpreting the term "white person" to refer to all non-Indians, rather than Caucasians alone. While statutes providing special protection for Indians are constitutional (*Morton v. Mancari*, 417 U.S. 535, 554-555 (1974); *United States v. Antelope*, 430 U.S. 641, 645 (1977)), a statute that discriminated between Caucasians and other non-Indians, as petitioners contend that Section 194 does, would be open to grave constitutional doubt. Since a construction of Section 194 that avoids this hazard is fairly possible, it should be adopted.

The State of Iowa protests that the language "white person" cannot include a state. But assuming, as we contend, that "white person" means a non-Indian, the State is within the reach of the statute if it is a "person." It is well settled that the statutory term "person" is broad enough to include a state, and that the question is one of legislative intent. Here, the purpose of Section 194 will be served if a state, like any other non-Indian claimant to Indian lands, is required affirmatively to prove its claims.

Otherwise, the protection of Section 194 could be defeated, for example, by the state's purchase of property subject to Indian claims of title.

C. Section 194 was properly invoked in this case. The Tribe and the government established a presumption of title to the Barrett survey area based on previous possession and ownership of that area, which was part of the land that the Tribe ceded to the government and that was set aside and occupied as part of the Omaha Reservation. It is undisputed that neither the government nor the Tribe have conveyed away the legal or equitable title to this area. Accordingly, under Section 194 the burden was on petitioners to prove their allegations that the Indians' title to the area was extinguished by the movements of the Missouri River. Petitioners had to establish their claim that the river's movements destroyed the original land by erosion and rebuilt new land within the same area by accretion, with the legal effect that title to the area was no longer in the Indians but vested in petitioners instead.

D. Petitioners argue that Section 194 must be narrowly construed to avoid jeopardizing title to land in huge areas of the country that once belonged to Indian tribes, and they point to the tribal land claims pending in various courts. Petitioners greatly overestimate the effect that Section 194 is likely to have. Most of the large tribal land claims now pending turn on essentially legal—not factual—issues, such as whether tribal conveyances of large tracts were authorized by treaty as required by the various Non-

intercourse Acts. The burden of proof provision of Section 194 has little bearing on these suits. While adoption of the restrictive interpretations that petitioners propose would indeed reduce the number of cases in which Section 194 could be invoked, it would do so by making the applicability of that Section turn on factors irrelevant to Congress's protective policy, and would thereby frustrate the purpose of Section 194. Neither dislike of the policy of Section 194, nor fear of the statute's unaccustomed use, justifies adopting the construction petitioners advocate. Redress for any such grievances resides with Congress, not this Court.

II.

The court of appeals correctly concluded that federal law, not state law, determines whether the boundary of the Omaha Indian Reservation was altered by the movements of the Missouri River. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), reaffirmed the longstanding rule that where no federal interest is implicated, state law governs the ownership of the banks and shores of waterways. But there are two independent federal interests that require the application of federal law in this case.

A. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), establishes that federal law must be applied where, as here, Indians assert rights to tribal lands that arise under federal law and are subject to continuing federal protection and supervision. In holding that an Indian claim to such lands presents a question of federal law, *Oneida*

recognized that Indian tribal land claims—unlike ordinary claims to land that was once under federal ownership—are governed by federal law, not state law, because tribal land remains subject to continuing federal interest and control. Indeed, the legal title to the land remains in the federal government, held in trust for the tribe. Accordingly, when a state or other claimants challenge Indian title, the question whether the land has passed out of federal trust ownership is a question that both *Corvallis* and *Oneida* recognize must be resolved by applying federal law.

As this case illustrates, legal doctrines interpreting river movements can substantially alter Indian land holdings. The government claims that 2,900 acres should be restored to the Omaha Reservation, and a claim by the Omaha Tribe to 8,000 additional acres is pending. The application of state law to deprive the Omahas of such large tracts of valuable farm land could seriously impair the purpose of the reservation. In a more extreme case, the application of state law could affect all the land in a reservation and result in eliminating the reservation. Changes in ownership of reservation land adjacent to watercourses may also have a critical impact on reservation activities such as farming, hunting, and fishing. Reservation lands might be cut off from sources of water essential for irrigation, or from accustomed stations for tribal hunting and fishing.

Because of the federal interest in protecting Indian tribal lands, the determination whether the movements of the Missouri River reduced the size

of the Omaha Reservation is a matter of federal law. Federal law may in many cases be the same as state law; indeed, federal law may have been modeled on state law where state law is consistent with federal policy. But as this case demonstrates, there are differences between the law of accretion and avulsion as it prevails in different states and as it has been adopted as a matter of federal common law. Those differences flow from generalized law-making judgments by the courts (or legislatures) of how best to resolve the competing claims arising from the movement of water courses. Where Indian tribal lands are concerned, the federal government has a substantial continuing interest in the protection of such tribal lands and in effectuation of the purposes for which Indian reservations were created. Accordingly, the question whether Indian title to a portion of a reservation has been lost must be determined by the application of federal common law, which embodies the sum of federal law-making judgments on the issues and interests involved.

B. Application of federal law is also required here because the border of the reservation—the thalweg of the Missouri River—coincided with the political boundary between Nebraska and Iowa at the time of the events in question. The location of this common boundary was therefore governed by the body of federal common law dealing with river borders of neighboring states or other political jurisdictions.

The 1943 compact between Iowa and Nebraska, which established the interstate boundary independent

of the river's future movements, itself disposes of petitioners' contentions that state law should apply because the location of the interstate boundary is no longer in doubt. As this Court held in *Nebraska v. Iowa*, 406 U.S. 117 (1972), Sections 2 and 3 of the compact require each State to recognize title that was "good in" the other State prior to the adoption of the compact. Prior to 1943, of course, federal law applied to determine the interstate boundary, and therefore also the coterminous boundary of the reservation. If the Tribe (and the United States) had good title to the Barrett survey area under federal law, this title was "good in" both States prior to 1943, and the compact prohibits Iowa from seeking to defeat the Tribe's title by invoking state law.

Moreover, the application of the federal common law governing the effect of river movements on political boundaries is justified because the thalweg marked the boundary of the grant to the Omaha Tribe as a political society.

ARGUMENT

I.

25 U.S.C. 194 PUTS THE BURDEN ON PETITIONERS TO PROVE THAT THE OMAHA TRIBE LOST TITLE TO THE BARRETT SURVEY AREA OF THEIR RESERVATION

Petitioners raise a number of questions regarding the proper construction of 25 U.S.C. 194, which provides:

In all trials about the right of property in which an Indian may be a party on one side,

and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Before turning to these specific questions, we will briefly review the background of the adoption of Section 194 and the principles that guide its interpretation.

A. Section 194 Should Be Given A Liberal Interpretation To Effectuate Congress's Policy Of Protecting Indian Lands

Section 194 is one of a group of statutes enacted in the late 1700's and early 1800's to protect Indian interests and particularly Indian land rights. In 1790 Congress passed the first of this series of enactments, popularly called Nonintercourse Acts, to regulate trade and other forms of intercourse between the various North American Indian tribes and non-Indians.¹⁰ The 1790 Act and its successors regulated a great many aspects of interaction between Indians and non-Indians. Each of the enactments controlled trade tightly by making it an offense for anyone not licensed and bonded as an Indian trader to trade or attempt to trade with the Indian tribes, or even to be found in Indian country with items of the kind

¹⁰ See the Act of July 22, 1790, ch. 33, 1 Stat. 137; the Act of March 1, 1793, ch. 19, 1 Stat. 329; the Act of May 19, 1796, ch. 30, 1 Stat. 469; the Act of March 3, 1799, ch. 46, 1 Stat. 743; the Act of April 22, 1800, ch. 30, 2 Stat. 39. See also the Act of January 17, 1800, ch. 5, 2 Stat. 6.

customarily traded to Indians.¹¹ The enactments from 1796 on also provided for the establishment of the boundary of the lands of various Indian tribes, prohibited non-Indians other than licensed traders from entering these lands for purposes such as hunting or pasturing animals, and prohibited entry to certain Indian lands without a passport.¹²

The 1790 Act and its successors also included a number of provisions designed to protect Indian rights to property. The 1790 Act stated that no conveyance of lands "by any Indians, or any nation or tribe of Indians within the United States, shall be valid" unless it was "made and duly executed at some public treaty, held under the authority of the United States," 1 Stat. 138, and each of the succeeding acts included a similar provision.¹³ Each of the enactments subsequent to 1793 also prohibited non-Indians from making settlements on lands belonging to any Indian

¹¹ Sections 1 and 3 of the Act of July 22, 1790, ch. 33, 1 Stat. 137; Sections 1 and 3 of the Act of March 1, 1793, ch. 19, 1 Stat. 329; Section 7 of the Act of May 19, 1796, ch. 30, 1 Stat. 471; Section 7 of the Act of March 3, 1799, ch. 46, 1 Stat. 745; Section 7 of the Act of March 30, 1802, ch. 13, 2 Stat. 142.

¹² Sections 1 to 3 of the Act of May 19, 1796, ch. 30, 1 Stat. 469; Sections 1 to 3 of the Act of March 3, 1799, ch. 46, 1 Stat. 743; Sections 1 to 3 of the Act of March 30, 1802, ch. 13, 2 Stat. 139-141.

¹³ Section 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138; Section 8 of the Act of March 1, 1793, ch. 19, 1 Stat. 330; Section 12 of the Act of May 19, 1796, ch. 30, 1 Stat. 472; Section 12 of the Act of March 3, 1799, ch. 46, 1 Stat. 746; Section 12 of the Act of March 30, 1802, ch. 13, 2 Stat. 143.

tribe, and authorized the use of force to remove persons who violated that restriction.¹⁴

The legislative precursor to Section 194 was Section 4 of the Act of May 6, 1822, ch. 58, 3 Stat. 683. This enactment amended the 1802 Nonintercourse Act¹⁵ to provide an additional protection for Indian property rights. The amendment stated:

That, in all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burthen of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

Except as it applied to "Indian tribes residing east of the Mississippi," the 1802 Act (and its 1822 amendment) was repealed by the Act of June 30, 1834, ch. 161, 4 Stat. 729, entitled "[a]n Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."¹⁶ The 1834 Act was an

¹⁴ Section 5 of the Act of March 1, 1793, ch. 19, 1 Stat. 330; Section 5 of the Act of May 19, 1796, ch. 30, 1 Stat. 470; Section 5 of the Act of March 3, 1799, ch. 46, 1 Stat. 745; Section 5 of the Act of March 30, 1802, ch. 13, 2 Stat. 141-142.

¹⁵ The Act of March 30, 1802, ch. 13, 2 Stat. 139.

¹⁶ Section 29 of the 1834 Act, 4 Stat. 734, repealed the 1802 Act, but added the proviso that "such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi * * *." Insofar as it

omnibus enactment combining a number of prior Indian statutes. Section 22 of the 1834 Act (4 Stat. 733) continued, with slight changes in language, the protection that had been added by the 1822 amendment. Section 22 provided:

That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

This provision is now codified as 25 U.S.C. 194.

The 1834 Act also carried forward the other provisions of the earlier Nonintercourse Acts protecting Indians lands, including the prohibition against non-Indian settlement on "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe," and the provision that no conveyance of lands "from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution." Sections 11 and 12, 4 Stat. 730.

Since Section 194 and these other provisions of the Nonintercourse Acts were intended to protect Indians as they came into increased contact with non-Indians, these provisions must be "liberally construed, doubt-

affected Indians east of the Mississippi, the 1802 Act was repealed by Section 5596 of the Revised Statutes (1873-1874).

ful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). This canon of interpretation is founded on the special relationship between the Federal Government and the Indian people, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). See *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

With this background in mind, we turn to consider each of the interpretative questions raised by petitioners.

B. Section 194 Is Applicable To Suits In Which An Indian Tribe Is A Party Or In Which The United States, As Trustee For Individual Indians Or An Indian Tribe, Is A Party

1. Petitioners contend that because Section 194 refers to suits in which "*an Indian* may be a party on one side," it has no application to a suit brought by an Indian tribe, or by the United States as trustee for a tribe or for individual Indians (78-160 Br. 26-29; 78-161 Br. 15-17). At the outset we note that the use of the singular term "an Indian" should provide no basis for a restrictive interpretation of Section 194, since singular and plural terms are generally used interchangeably in federal statutes. 1 U.S.C. 1.¹⁷ More

¹⁷ Section 1 of Title 1, which sets forth general rules of construction for the remainder of the United States Code, provides that "unless the context indicates otherwise—words importing the singular include and apply to several persons,

important, the narrow construction of Section 194 that petitioners advocate is wholly inconsistent with Congress's broad protective policy, and it would lead to the anomalous result that the burden of proof would differ in cases involving precisely the same substantive claims depending on who was the formal party to the suit.

The purpose of Section 194—to ensure that Indians are not deprived of their lands in judicial proceedings unless non-Indians can affirmatively prove their claims—is equally applicable when a tribe, rather than an individual Indian, is a party, or when the United States brings suit as trustee for Indians. Section 194 should be construed to effectuate its protective purpose.¹⁸ As we have shown, Section 194 was one of the many provisions of the 1802 and 1834 Nonintercourse Acts that were designed to protect Indian possession of lands “belonging, secured, or granted by treaty with the United States to any Indian Tribe.” See Section 11 of the Act of June 30, 1834, ch. 161, 4 Stat. 730. Construing Section 194 as inapplicable to suits brought by an Indian tribe would deny the protection of that provision to most Indian trust lands, since as a general matter “[w]hatever title the Indians have is in the tribe,

parties, or things,” and “words importing the plural include the singular.”

¹⁸ This Court has often recognized “the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others.” *United States v. Oklahoma Gas Co.*, 318 U.S. 206, 211 (1943).

and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.’” *United States v. Jim*, 409 U.S. 80, 82 (1972), quoting *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902).

Moreover, construing Section 194 as inapplicable to suits in which a tribe or the United States represents the interests of individual Indians would make the burden of proof turn on the wholly formal matter of the name or names in which the suit was brought, without regard to the interests that Congress was seeking to protect. There can be no doubt that by its express terms Section 194 applies to a suit brought by one or more individual Indians: It is applicable whenever “an Indian” is “a party.” Accordingly, Section 194 would be applicable to a suit in which all of the individual members of a tribe were parties. Yet petitioners contend that Section 194 does not apply if the same suit is brought in the name of the tribe. And, although either the United States¹⁹ or a tribe²⁰ may bring suit on behalf of an individual Indian, petitioners contend that Section 194 should be construed as inapplicable where a suit seeks to enforce the rights of an individual Indian—who is clearly the real party in interest—if the suit is brought in the name of the United States or his tribe.

¹⁹ See, e.g., *Heckman v. United States*, 224 U.S. 413 (1912) (suit on behalf of allottees); *Oklahoma v. Texas*, 258 U.S. 574 (1922) (same).

²⁰ See, e.g., *Puyallup Tribe, Inc. v. Washington Game Department*, 433 U.S. 165, 169-173 (1977).

In light of Congress's protective purpose and the rule requiring that any ambiguity be resolved in favor of Indian interests, there is no justification for giving Section 194 the "crabbed or restrictive meaning" that petitioners propose. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 176 (1973).

2. Petitioners urge (No. 78-160 Br. 28; No. 78-161 Br. 15-16), however, that the change from the language used in the original amendment passed in 1822—referring to actions in which "Indians shall be a party"—to the language used in the 1834 Act—referring to actions in which "an Indian may be a party"—shows that Congress deliberately limited the latter provision, now codified as Section 194, to exclude claims by groups of Indians or Indian tribes.

Nothing in the legislative history supports the notion that Congress in 1834 intended to narrow the scope of the protective amendment added in 1822. To the contrary, although the only committee report prepared in 1834 does not discuss Section 194 (Section 22 of the 1834 Act),²¹ the available evi-

²¹ H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834) includes a discussion of the bill ultimately passed as the 1834 Act, as well as two other bills. It contains no discussion of Section 194 (Section 23 of the proposed bill, reprinted *id.* at 32). The portion of the report cited by petitioners (No. 78-160 Br. 32), when read in context, refers only to the provisions for licensing Indian traders (*id.* at 11):

The Indian trade, as heretofore, will continue to be carried on by licensed traders. The Indians do not meet the traders on equal terms and no doubt have much reason to complain of fraud and imposition. Some further

dence shows that no change was intended. The 1834 Act appears to have been the outgrowth of a report by General William Clark and Governor Lewis Cass that proposed the codification of many existing Indian statutes into one law. The Clark-Cass report is set out in H.R. Doc. No. 117, 20th Cong., 2d Sess. (1829).²² It includes a proposed revised Indian statute similar to the statute ultimately enacted in 1834. With respect to each section of the proposed statute, the report sets out the source of the section and states whether any change was intended from existing law. 25 U.S.C. 194, as it was enacted in the 1834 statute, is set out as Section 27 of the 1829 report, and the annotation accompanying that section indicates that no changes were contemplated.²³

provision seems necessary for their protection. Heretofore, it has been considered that every person (whatsoever might be his character) was entitled to a license on offering his bond. It has been the source of much complaint with the Indians. Power is now given to refuse licenses to persons of bad character, and for a more general reason "that it would be improper to permit such persons to reside in Indian country;" and to revoke licenses for the same reason.

²² The Clark-Cass report was prepared in response to a resolution of the House of Representatives; the authors were invited to prepare "a revised system of laws and regulations on the subject of our Indian affairs," and their report was submitted to Congress by the Department of War. See *id.* at 1-3.

²³ The annotation merely states: "This enactment is taken from the fourth section of the act of May 6, 1822." In other sections of the proposed statute where significant change was intended, the annotations so indicated.

Although no change in the scope of the section was intended, the language of the 1822 amendment was modified to make the syntax consistent throughout. The 1822 version (Section 4 of the Act of May 6, 1822, ch. 58, 3 Stat. 683) had shifted uncomfortably between plural and singular terms (emphasis added):

And be it further enacted, That, in all trials about the right of property, in which *Indians* shall be party on one side and *white persons* on the other, the burthen of proof shall rest upon *the white person*, in every case in which *the Indian* shall make out a presumption of title in *himself* from the fact of previous possession and ownership.

The 1834 version resolved this internal conflict by using singular terms to describe both the "Indian" party and the "white" party throughout the section.

Although petitioners offer no direct evidence of a congressional intent to do anything other than eliminate the results of the awkward drafting in the 1822 amendment, they argue that changes in other provisions of the 1802 Act show that Congress intended the 1834 Act to treat tribal property differently from property owned by individual Indians. In particular, petitioners focus on the change in Section 12 between the 1802 and 1834 Acts. Section 12 of the 1802 Act, 2 Stat. 143, provided that no conveyance or grant of land "from any Indian, or nation, or tribe of Indians" would be valid unless "made by treaty or convention, entered into pursuant to the constitution." Section 12 of the 1834 Act applied only to a conveyance or grant "from any Indian nation or tribe of Indians." 4 Stat.

730. Petitioners infer from this change that Congress provided different schemes of protection for land owned by individual Indians, which would be covered by Section 194 (Section 22 of the 1834 Act), and land owned by a tribe, which would be protected by Section 12.

There is no evidence to show that the change from the plural to the singular in Section 194 had any relation to the change in Section 12. The latter change, removing the requirement that conveyances by individual Indians be made by treaty,²⁴ recognized the right of individual Indians to alienate their individual property and the obvious impracticality of requiring that all transfers of property by individual Indians be made by treaty, with the advice and consent of the Senate. This change had no effect on conveyances by Indian tribes, which required treaty validation under Section 12 of the 1834 Act just as they did under Section 12 of the 1802 Act. Since no change was made in the treatment of property transfers by tribes under Section 12, petitioners' claim that Congress intended a corresponding change to remove tribes from the protection afforded by Section 194 is, at best, speculation.

Because there were wholly independent reasons for the changes made in Section 194 and Section 12, no inference of an intent to narrow the scope of Section

²⁴ *Jones v. Meehan*, 175 U.S. 1, 12-13 (1899), holds that Section 12 of the 1834 Act does not apply to conveyances by individual Indians.

194 may be drawn, especially since the Clark-Cass report to Congress that preceded the adoption of the 1834 Act showed no intent to make any change. The attenuated inference that petitioners seek to draw would be dubious in any context. It is plainly insufficient to justify a narrow reading of a provision intended by Congress to protect the Indian people.

C. Section 194 Applies To Suits About The Right To Property Between An Indian And A Non-Indian

Petitioners also contend (No. 78-160 Br. 29-32; No. 78-161 Br. 12-15) that the term "white person" in Section 194 refers only to an individual of the Caucasian race, and thus has no application to individuals of other races or to corporations or states.²⁵ This construction should be rejected because it is at odds with Congress's intent to protect Indians from the loss of their lands to non-Indians. Moreover, a review of the other provisions of both the 1834 Act and its predecessors reveals that Congress used the phrase "white person" in contexts where it plainly referred to all

²⁵ Petitioners additionally contend (No. 78-160 Br. 29-30) that there is no evidence in the record of their race. As we understand this suggestion, it is a subpoint of their main contention that Section 194 applies only if they are shown to be Caucasians. The claim is that there was no evidence that the individual petitioners are Caucasians. As we will show, however, Section 194 applies to all non-Indians, not merely Caucasians. So far as we are aware, petitioners have never asserted that they are Indians, and do not do so now. However, if there is a contention that one of the petitioners is an Indian, then that question could be referred to the trial court for a hearing.

non-Indians. In addition, the construction petitioners advocate—which draws a distinction between Caucasians and other non-Indians solely on the basis of race—should be rejected because it would raise grave doubts about the constitutionality of Section 194.

1. Interpreting the phrase "white person" in Section 194 as limited to individuals of the Caucasian race would undermine the protective policy of that statute. The protection of Section 194 could be avoided by Caucasian individuals by the simple expedient of forming a corporation through which to conduct their dealings with Indians.²⁶ And no protection would be afforded against the claims of any non-Caucasians. Construing 194 as applicable to actions between Indians and non-Indians is necessary to carry out Congress's policy of safeguarding Indian lands and other property.

2. Congress used the phrase "white person" in several sections of the 1834 Act in contexts where it was clearly intended to refer to all non-Indians. For example, Section 20 states that "any person" who sells

²⁶ The general rules of construction for the United States Code establish a presumption against a construction that would allow an individual to avoid legal restrictions by establishing a separate corporate entity. Section 1 of Title 1 provides that "unless the context indicates otherwise" the word "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies * * *." Cf. *Monell v. Department of Social Services*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").

or gives liquor to an Indian in Indian country, or who attempts to introduce liquor into Indian country, will be subject to a fine; and the same section further provides that if government officials suspect "that *any white person or Indian*" has introduced or is about to introduce liquor into Indian country, the officials may order that person's goods searched. 4 Stat. 732. It is evident that the phrase "white person" was intended to include any non-Indian, since the authorization to search for suspected liquor was intended to effectuate the prohibition in the first portion of the section against "any person" introducing liquor into Indian country.²⁷ Similarly, Section 7 of the 1834 Act, 4 Stat. 730, forbids "any person other than an Indian" to barter with an Indian in Indian country for goods "of the kind commonly obtained by the Indians in their intercourse with the white people." Again, the term "white people" is evidently equated with non-Indians.

Other sections in earlier Nonintercourse Acts also used the phrase "white man" to refer to any non-Indian. Section 10 of the 1802 Act, 2 Stat. 142, provided that no citizen or other person could purchase "any horse of an Indian, or of any white man in the Indian territory, without special license." The same

²⁷ A further indication of Congress's intent is found in the draft statute included in the 1829 Clark-Cass report (see page 29, *supra*). Section 49 of the draft statute, which corresponds to Section 20 of the 1834 Act, provided that "any person" suspected of introducing liquor into Indian country could be searched. H.R. Doc. No. 117, *supra*, at 40-41.

provision was included in the Nonintercourse Acts of 1793,²⁸ 1796,²⁹ and 1799.³⁰ Since the provision was designed to regulate comprehensively the sale of horses in Indian country, it seems clear that the licensing requirement was intended to apply to the purchase of horses from any Indians or any non-Indians.

3. Petitioners and their supporting amici point out³¹ that other sections of the 1834 Act employ different phrases—particularly "any person other than an Indian"—to refer to all non-Indians. They accordingly argue that when Congress said "white person," it meant Caucasian, not non-Indian. The argument rests on the unspoken premise that Congress used particular terms consistently and precisely throughout the 1834 Act.

But a review of the 1834 Act—which was, as we have noted, an amalgam of prior Indian statutes—shows that a variety of terms and phrases are used from section to section to refer to the same concept, and conversely the meaning of the same term may vary from section to section. Sections 13 through 15, 4 Stat. 731, use the phrase "any citizen or other person." In many other sections, the terms "person" or "any person" are used instead. See Sections 2, 9, 11, 12, 17, 20, 21, 26, 4 Stat. 729, 730, 731, 732, 733.

²⁸ Section 6 of the Act of March 1, 1793, ch. 19, 1 Stat. 330.

²⁹ Section 10 of the Act of May 19, 1796, ch. 30, 1 Stat. 471.

³⁰ Section 10 of the Act of March 3, 1799, ch. 46, 1 Stat. 746.

³¹ See No. 78-160 Br. 30, No. 78-161 Br. 16; amici Indiana, *et al.* Br. 12-13.

In some sections of the 1834 Act, the unqualified term "person" appears to include Indians:

Section 20 (4 Stat. 732) forbids "any person" to provide liquor to Indians in Indian country;

Section 21 (4 Stat. 732-733) forbids "any person" to operate a distillery in Indian country;

Section 26 (4 Stat. 733) authorizes the apprehension of "any person" charged with violating the Act.

In other sections, the term "person" is used in a context that seems to exclude Indians:

Section 2 (4 Stat. 729) provides that no "person" may trade with Indians without a license; under Section 5 (4 Stat. 730), only citizens—a term that generally excluded Indians—could be licensed;

Section 9 (4 Stat. 730) provides that no "person" may drive stock to range or feed on Indian lands;

Section 11 (4 Stat. 730) provides that "any person" who settles on or surveys Indian land may be removed by military force and fined;

Section 17 (4 Stat. 731) provides for the payment of indemnification if Indians destroy the property of "any person" lawfully in Indian country.³²

³² Thus it is irrelevant that the word "person" in some sections of the 1834 Act, such as the provision (Section 3, 4 Stat. 729) that no "person" of "bad character" be licensed as a trader, refers to what petitioners call "flesh and blood people—human beings." (No. 78-160 Br. 29-30). This is only one of various usages of that word in the Act.

In view of the varying usage of other terms from section to section of the 1834 Act, it is no surprise that Congress used not only the phrase "any person other than an Indian" (Sections 4 through 7, 4 Stat. 729-730), but also the phrases "white people" and "white person" (Sections 7, 20, and 22, 4 Stat. 730, 732, 733), to refer to all non-Indians. The meaning of the language used in any particular section must be gathered from the purpose and context of that section. The purpose of Section 22—now codified as 25 U.S.C. 194—was to protect Indians against the loss of their lands to non-Indians. The phrase "white person" should be interpreted in light of that purpose and to effectuate it.

4. Petitioners urge the Court to apply here the decision in *United States v. Perryman*, 100 U.S. 235 (1879), which interprets the phrase "white person" in Section 16 of the 1834 Act, 4 Stat. 731, to exclude a black person. As we have shown, the meaning of particular terms and phrases varies from section to section of the 1834 Act, and thus the meaning of the phrase "white person" in Section 16 does not govern the meaning of that phrase in Section 22 (now 25 U.S.C. 194). Moreover, the *Perryman* decision was grounded on the peculiar legislative history of Section 16. That section provided for indemnification guaranteed by the government for the taking or destruction of Indian property by "a white person" committing a criminal offense in Indian country. The Court emphasized in *Perryman* that the words "a white person" had been substituted in Section 16 of the 1834

Act for the broader phrase “any such citizen [resident in the United States] or other person” used in the analogous section of the 1802 Act (Section 4 of the Act of March 30, 1802, ch. 13, 2 Stat. 141), and the Court concluded that this had been done with the intent of excluding fugitive black slaves who might seek refuge among tribes such as the Cherokees. 100 U.S. at 237-238. The government’s brief in this Court argued (Brief for the United States, No. 153, October Term, 1879 at 7-8) that the change had been made because of the situation in Georgia, where the refusal of the Cherokees and Creeks to return fugitive slaves had led to armed warfare. The Court agreed with this interpretation, concluding that the change in language had been made “as a means of preventing the escape of slaves” because Congress believed that “if the United States made themselves liable only for such depredations as were committed by the whites, [the Cherokees] and other Indians would be less likely to tolerate fugitive blacks in their country.” 100 U.S. at 238.³³

³³ With respect, we question whether the Court’s analysis of the legislative history was correct. The government’s brief in *Perryman* provided no documentation for the assertion that the change in the language in Section 16 of the 1934 Act was intended to meet the fugitive slave problem, and we know of none. The 1829 Clark-Cass report described the purpose of the provision in effect in 1802 as follows:

The 4th section of the act of March 30, 1802, introduces the principle of the eventual guarantee of the United States for the payment to the Indians of injuries to their property, when committed by white persons in the In-

In contrast, the language of Section 194 was not amended to meet any particular legislative purpose. Instead, the 1822 amendment to the 1802 Act, as carried over into the 1834 Act, simply used the words “white person” to mean non-Indian.

5. In addition, to interpret “white person” to mean Caucasian would raise serious doubts about the constitutionality of Section 194, which can and should be avoided by construing the term to mean non-Indian. “[L]egislation that singles out Indians for particular and special treatment” will be upheld “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” *Morton v. Mancari*, 417 U.S. 535, 554-555 (1974). As the Court explained in *United States v. Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted):

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are

dian country. The object of the law was, doubtless, to quiet the Indians, and to prevent them from seeking to obtain private satisfaction.

H.R. Doc. No. 117, *supra*, at 36 (emphasis added). The term “white persons” was thus used in the report synonymously with the broader language—“any such citizen or other person”—of the 1802 Act (see page 38, *supra*), which suggests that no change was intended by the substitution of the term “a white person” in the Act itself in 1834. (The Clark-Cass report was not referred to by the Court in *Perryman*, and so far as the briefs disclose it was not cited to the Court.)

expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

But a provision discriminating between Caucasians and other non-Indians who dispute Indian property rights would stand on a completely different footing. As the Court stated in *Loving v. Virginia*, 388 U.S. 1, 11 (1967):

Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

The same standard applies to federal legislation under the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Since a distinction between Caucasians and other non-Indians in Section 194 would frustrate, rather than promote, the congressional policy of protecting Indian lands from dubious claims, we believe that it

could not withstand the strict scrutiny to which it would be subject.

Although the constitutionality of a distinction between Caucasians and other non-Indians in Section 194 is not presently before the Court, the construction of that statute should be guided by the serious constitutional doubts that would be raised if it were construed to apply only to suits between Caucasians and Indians. "[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Since the construction of "white person" to mean non-Indian is far more than "fairly possible," it should be adopted.

6. The State of Iowa argues (Br. 15) that the phrase "white person" in Section 194 cannot be construed to include a state without "straining reasonable interpretation of the words used" and "rais[ing] serious federalism (and comity) problems."

Construing Section 194 as applicable to a state does not strain the meaning of the words used in Section 194. Assuming, as we have argued, that Congress used the phrase "white person" to refer to persons who are not Indians, the question is whether the states—which are certainly not Indians—are "persons" for the purposes of Section 194.

The word "person" is often used comprehensively to include artificial persons, including governmental bodies. This Court has on numerous occasions con-

strued the statutory term "person" to include the states. See, e.g., *Hawaii v. Standard Oil Company*, 405 U.S. 251, 261 (1972) (Section 4 of the Clayton Act, 15 U.S.C. 15); *Sims v. United States*, 359 U.S. 108, 112 (1959) (Section 6332 of the Internal Revenue Code of 1954, 26 U.S.C. 6332); *Georgia v. Evans*, 316 U.S. 159 (1942) (Section 7 of the Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, 210); *Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (26 U.S.C. (1928 ed.) 205). Cf. *Pfizer Inc. v. India*, 434 U.S. 308, 311-313 (1978) (foreign nation a "person" under Section 4 of the Clayton Act); *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (local government units "persons" under 42 U.S.C. 1983). As the Court stated in *Georgia v. Evans*, *supra*, 316 U.S. at 161:

Whether the word "person" or "corporation" includes a State or the United States depends upon its legislative environment. *Ohio v. Helvering*, 292 U.S. 360, 370. [*United States v. Cooper*, 312 U.S. 600, 604-605 (1941)] recognized that "there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law."

The purpose of Section 194 and its "legislative environment" show that the term "person" should be read broadly to include the states. In many cases the state stands on precisely the same footing as a private landowner; indeed, it may have derived its claim of

title to the land in dispute from a private landowner by purchase, condemnation, or foreclosure of a tax lien. In such cases, if the private non-Indian owner had retained the claim to the land, and an Indian claimant had made out a presumption of title, Section 194 would have required the non-Indian claimant to carry the burden of proof. But, under petitioners' theory, if the state acquired its claim from the non-Indian—and presumably took no better claim than its grantor had—Section 194 would not apply as between the Indian claimant and the state.

Indeed, under petitioners' theory, if the state acquires a claim to an easement from a private non-Indian grantor, and the grantor's title to the property over which the easement runs is subsequently drawn into question by an Indian claimant, Section 194 would apply to all of the grantor's claim to the property, but not to the state's claim to the easement. Likewise, under petitioners' theory, if a single grantor divides his property, selling part to the state and part to private individuals, and an Indian claimant subsequently challenges the grantor's title, Section 194 would be applicable to the portion of the property sold to individuals, but not to the portion sold by the same grantor to the state.

It seems plain that the protective policy of Section 194 requires its application to the dispute between the Indian claimant and the state in these situations. Since the term "person" is sufficiently broad to include the states, it should be construed to effectuate

Congress's policy, especially since any ambiguity is to be resolved in favor of protecting Indian interests.

Petitioners and particularly the amici States³⁴ ignore the many circumstances where the states' rights are clearly no different from those of a private landowner, and they focus on the distinctive nature of the state's "sovereign" title to riverbeds acquired under the equal-footing doctrine. It is important to note that this case does not involve an Indian claimant invoking Section 194 in order to divest the State of Iowa of lands it has held since its admission to the Union. Rather, it involves a claim by the State of Iowa that the movements of the Missouri River—after the State's admission to the Union in 1846—divested the Omaha Tribe of title to land that was admittedly not part of the original grant to Iowa under the equal-footing doctrine. As this case indicates, the applicability of Section 194 to lands acquired by a state under the equal-footing doctrine is limited by the statute's requirement that the Indian claimant show a presumption of title based on previous possession or ownership. If title to particular land did vest in the state under the equal-footing doctrine, Section 194 would not apply unless Indians subsequently took title. Thus, the application of Section 194 to the states create no general threat to "sovereign" state lands.

³⁴ This argument is made by amici California, *et al.* (Br. 34-37) and amici Indiana, *et al.* (Br. 16).

D. Section 194 Was Properly Applied In This Case

As we have shown, Section 194 is applicable to suits "about the right of property" between an Indian claimant—whether an individual Indian or a tribe, or the United States as trustee—and a non-Indian, when the Indian claimant establishes a presumption of title from previous possession or ownership. Even if this construction is accepted, petitioners urge that Section 194 was not properly applied in the present case. They contend that the government and the Tribe failed to establish a presumption of title and further that, if the presumption was established, the burden of *persuasion* should not have been placed on petitioners. These contentions are without merit.³⁵

1. Petitioners contend (No. 78-160 Br. 32-35) that the government and the Tribe failed to establish a presumption of title to the land within the Barrett survey so as to invoke Section 194. They argue that applying Section 194 assumes the very point in controversy—namely that the land within the Barrett survey area today is the same land that was originally within the Barrett survey area of the reservation, rather than (as petitioners contend) new land built up by accretion after the original land was destroyed by erosion.

³⁵ We note, however, that if the court of appeals did err in applying Section 194 to this case, it would be necessary to remand the case for reconsideration under the proper standard, since the United States and the Tribe contend that the district court's decision was erroneous even if Section 194 were inapplicable (and, indeed, even if all issues were governed by state law).

The court of appeals correctly rejected this contention (Pet. App. A21-A22). The court pointed out that it was undisputed that the 1854 treaty established the United States as titleholder of the Barrett survey area, which was part of the land set aside as a reservation for the Omaha Tribe. It was also undisputed that neither the United States nor the Tribe ever ceded or conveyed its interest in the Barrett survey area. Accordingly, the question was whether, as petitioners contended, the subsequent movements of the Missouri River deprived the United States and the Tribe of legal and equitable title to the area within the Barrett survey lines—what petitioners term “the same area under the sky.” The court of appeals properly refused to deprive the Tribe of the protection of Section 194 because of petitioners’ allegations that the land in this area had subsequently been destroyed by erosion, and new land formed within the area. The purpose of Section 194 is to require a non-Indian claiming title to land formerly owned by Indians to carry the burden of not merely alleging, but also proving, whatever facts are necessary to show that Indian title was extinguished and good title vested in the non-Indian claimant. This purpose applies whether the facts on which the non-Indian relies show an allegedly valid conveyance or whether they involve the movement of a river boundary that is alleged to have resulted in a change of title to a given area of land.

Petitioners also argue (No. 78-160 Br. 35-40) that the government and the Tribe could not establish

the requisite presumption of title under Section 194 by proof of ownership and possession so many years prior to trial, in light of the many changes in circumstances. They point out that under Iowa law they are the record titleholders, that they or their grantors have been in possession of the land for decades, and that this possession went unchallenged by the Tribe and the government for many years. They also contend that various evidentiary presumptions—such as the presumption of ownership that follows from record title, and the claimed presumption that river movements are accretive rather than avulsive—rebut the presumption of title arising from the showing that the Barrett survey area was part of the reservation in 1867.

Petitioners’ claim that changes in circumstance over the years preclude the presumption of title necessary to invoke Section 194 ignores the clear directive of that section. Section 194 provides that once the Indian claimant shows “a presumption of title in himself from the fact of previous possession or ownership,” the burden shifts to the non-Indian claimant to establish his own title. The statute does not require that the “previous possession or ownership” be recent. All of the evidence that petitioners cite is relevant not to the threshold showing of the Indian claimants’ presumption of title, but rather to the ultimate issue of present ownership. In making their case on this ultimate issue, petitioners are entitled to rely on whatever presumptions may flow from the evidence they

introduce, and the same is true for the Tribe and the government.

2. Petitioners also argue (No. 78-160 Br. 41) that Section 194 does not require a non-Indian claimant to shoulder the ultimate burden of persuasion, but only the burden of going forward with evidence to meet the Indian claimant's *prima facie* case. Petitioners' contention ignores the fact that Section 194 itself distinguishes between a "presumption"—which imposes on the party against whom it is directed the burden of going forward with evidence—and the ultimate "burden of proof."³⁶ Under petitioners' construction, Section 194 would be redundant; it would simply state the truism that where an Indian claimant has made out a presumption of title, a non-Indian claimant has the burden of producing evidence to rebut the presumption. There is no basis for giving Section 194 such a circular construction.

E. A Restrictive Interpretation Of Section 194 Is Not Justified By The Policy Of Promoting The Security Of Title To Land

A central theme in the briefs filed by both petitioners and their supporting amici is the argument that Section 194 must be given the most restrictive inter-

³⁶ See, e.g., *Mobile, Jackson & Kansas City R.R. v. Turnipseed*, 219 U.S. 35, 42-43 (1910) ("[T]he effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. * * * The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary."). See also Fed. R. Evid. 301.

pretation possible in order to avoid throwing into question title to land in huge areas in the United States that were once in Indian ownership (No. 78-161 Br. 8, 17; amici Indiana, *et al.* Br. 16; amicus American Land Title Association Br. 3-5).

In our view, petitioners and their amici greatly overestimate the impact Section 194 is likely to have. Amicus American Land Title Association lists some of the "extensive Indian claims litigation for the recovery of land and for trespass or other damages for the wrongful possession of land" that has been instituted by the United States as trustee and by various Indian tribes in their own right (Br. 3-4 n.3). As the Title Association acknowledges (Br. 4; footnote omitted), the suits to which it refers are based on the claim "that past acquisitions of Indian tribal land by the defendants or their predecessors in interest were invalid and of no effect." Most, if not all, of these suits are based on the requirement included in each of the succeeding versions of the Nonintercourse Acts (see page 22, *supra*) that any conveyance of tribal lands must be made pursuant to a treaty subject to congressional approval. See also *Oneida Indian Nation v. County of Oneida*, *supra*, 414 U.S. at 664-665; *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). The central issues in virtually all of these cases are issues of law, such as whether the conveyance was subject to the Nonintercourse Act, and whether it was made by treaty with congressional approval. The provision in Section 194 affecting the "burden of proof" in "trials about the

right of property" will have little, if any, impact on those issues.³⁷

It is true, nevertheless, that giving Section 194 the restrictive meaning petitioners advocate would reduce the number of cases where the Section might apply. But it would make the applicability of the section turn on factors wholly irrelevant to Congress's purposes in enacting it. For example, under petitioners' theory, if land claimed by an Indian is transferred from a Caucasian individual to a black individual or to a corporation, the protection of Section 194 is defeated. Likewise, if the United States sues as trustee for and co-plaintiff with an individual Indian, to enforce his property claim, Section 194 applies; but if the individual Indian is not joined as a formal party, Section 194 cannot be invoked, on petitioners' theory, even though precisely the same interests are at stake. Neither dislike of the policy embodied in Section 194

³⁷ So far as we know, Section 194 has not been applied in any of the cases cited by the Title Association. In *Mashpee Tribe v. New Seabury Corp.*, No. 78-1278 (1st Cir. Feb. 13, 1979), the tribe appealed from the decision of the district court dismissing their claim under the Nonintercourse Act of 1790 on the ground that the Mashpees were not an Indian tribe at all the relevant times. The court of appeals held that the Mashpees could not invoke Section 194 (whatever its applicability to the case might otherwise be) until they had established that they had been an Indian tribe at all relevant times, which the court said was a prerequisite to proving a presumption of title in the circumstances of the case (slip op. 22-23). The court expressly noted that it need not decide whether Section 194 may be invoked by an Indian tribe, or how to construe the term "white person" (slip op. 23 n.11).

nor fear of the statute's unaccustomed use justifies giving it an interpretation that would make its applicability turn on such random factors. The appropriate redress for any such grievances resides with the Congress.

II.

FEDERAL LAW DETERMINES WHETHER THE BOUNDARY OF THE OMAHA INDIAN RESERVATION WAS ALTERED BY THE MOVEMENT OF THE MISSOURI RIVER

As the court of appeals recognized (Pet. App. A13), this Court's decision in *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), reaffirmed the longstanding rule that where no federal interest is implicated, "the laws of the several states determine the ownership of the banks and shores of waterways." In *Corvallis* the Court concluded that the equal-footing doctrine, under which the State of Oregon received title to the beds of navigable streams, did not provide a basis for applying federal law to determine the legal effect of the movements of the river after title had vested in the State and the riparian owner. *Corvallis* held that the general rule applicable to other federal land grants applies to equal-footing grants as well:

"We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to

those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation*; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

429 U.S. at 377, quoting *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839) (emphasis by the Court in *Corvallis*).

The Court concluded that state law governed the dispute between the State of Oregon and the riparian owner in *Corvallis* because there was no "claim of federal right" other than the equal-footing origin of the State's title. 429 U.S. at 372. Thus, *Corvallis* teaches that state law applies to determine the effect of the movements of a river on land rights unless there is "some other principle of federal law [other than title derived from the equal-footing doctrine or some other federal grant] requiring state law to be displaced." 429 U.S. at 371; see *id.* at 372.³⁵

³⁵ Iowa emphasizes (No. 78-161 Br. 23) the statement in *Corvallis* (429 U.S. at 370-371) that "the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." As we will discuss (page 72, *infra*), this statement cannot be read as holding that state title is not subject to federal common law even when continuing federal interests are present, in view of the Court's express recognition of circumstances where federal law applies (and may result in a title determination adverse to the state)—for example, where there is movement in a body of water that serves as an interstate boundary. See 429 U.S. at 375.

The decision of the court of appeals is fully consonant with *Corvallis*. As the court of appeals correctly concluded (Pet. App. A13-A20), there are two independent federal interests that require the application of federal law to determine the effect of the Missouri River's movements between 1875 and 1923 on the boundary of the Omaha Indian Reservation. First, the Omahas are asserting not merely title derived from a federal grant, but a federally created and protected right to continuing possession of tribal land; and the United States, which holds the tribal land in trust for the Omahas, is itself asserting its title in this suit. Second, at the time of the events in question the thalweg of the Missouri marked not only the boundary of the Omaha Indian Reservation (itself a distinct political entity), but also the interstate boundary between Nebraska and Iowa. The effect of the river's movements on this political boundary is governed by federal law, not by the law of either state.

There is no merit, then, to petitioners' argument that the application of federal law contravenes principles of federalism and the rule that "[t]here is no federal general common law." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The application of "specialized federal common law" to cases involving substantial federal interests is fully consonant with *Erie*. See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 407 (1964).

A. The Omaha Reservation Was Established By Federal Law And Is Held In Trust For The Tribe By The United States, Subject to Continuing Federal Protection And Supervision

In the 1854 treaty between the United States and the Omaha Tribe, the Tribe ceded to the federal government approximately 5 million acres of its aboriginal lands,³⁹ reserving "for their future home" an area not to exceed 300,000 acres to be designated by the President and "acceptable to them." Art. 1, 10 Stat. 1043.⁴⁰ The Tribe selected land in the Blackbird Hills area on the western bank of the Missouri River as the site for their reservation (A. 266, 270-274). The President concurred in the Omahas' selection, and the reservation was established as their permanent home (A. 265-274). The eastern boundary of the reservation was the center of the main channel of the Missouri River.⁴¹ That land, as modified by subsequent

³⁹ See *United States v. Omaha Tribe of Indians*, 253 U.S. 275, 278 (1920).

⁴⁰ Article 1 also tentatively designated a portion of the ceded area to serve as a reservation if the Tribe deemed it acceptable. The Tribe rejected the tract identified in Article I (A. 266-274).

⁴¹ Both the district court and the court of appeals held that the thalweg, or center of the main channel, formed the boundary of the reservation (Pet. App. A6 & n.5, B3). Although this finding was not challenged in the courts below, the petitioners in No. 78-160 now suggest (Br. 43-44 n.5) that the reservation extended only to the bank of the river until Nebraska relinquished ownership of the bed to riparian owners—including the Omahas—in 1906. This contention is without merit. The authorization for the original survey and the

treaty⁴² and statutes,⁴³ has remained the Tribe's home.

surveyor's notes describe the reservation as extending "from a given point upon the river to another point thereupon" (A. 271), and to the Missouri River and "thence down said river to place of beginning" (A. 270). Under federal law this description included the bed up to the thalweg. As this Court stated in construing similar language describing the boundary of a reservation as "up the Arkansas" and "down the Arkansas":

Congress was accustomed to using the terms "up" or "down" the river when designating a navigable river as the boundary between States, see, e.g., Act of March 2, 1819, § 2, 3 Stat. 490 (Alabama); Act of February 20, 1811, § 1, 2 Stat. 641 (Louisiana), and, when it did so, the boundary was set as the middle of the main channel [citations omitted].

Given this congressional usage, it seems natural for the President, on whose behalf the treaties had been negotiated, to have given the same interpretation to identical language in the analogous situation involving the boundary between petitioners Choctaw and Cherokee Nations, which had long been considered sovereign entities. * * * The grants to petitioners were undoubtedly to them as "a political society," and any "well founded doubt" regarding the boundaries must, of course, be resolved in their favor.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 631-632 n.8 (1970).

⁴² The Omahas ceded a portion of their reservation for the settlement of the Winnebago Tribe by the Treaty of March 6, 1865, reprinted at 14 Stat. 667.

⁴³ The Act of June 22, 1874, ch. 389, 18 Stat. 146, 170, authorized the purchase of 20 sections of land from the Omahas for the location of the Wisconsin Winnebagos. The Act of August 7, 1882, ch. 434, 22 Stat. 341 (which superseded the Act of June 10, 1872, ch. 436, 17 Stat. 391), authorized the sale, with the Omahas' consent, of a portion of

The United States holds title to the reservation land in trust for the Tribe (Pet. App. A3 & n.2).

The 1854 Treaty clearly demonstrates the intention that with federal protection and assistance the Omahas were to support themselves by farming on the reservation. Article 4 (10 Stat. 1044) provided that the annuities to be paid to the Omahas could be used for purposes including "opening farms, fencing, breaking land, providing stock, agricultural implements, [and] seeds." In Article 8 (10 Stat. 1045), the government agreed to build a gristmill, a sawmill, and a blacksmith shop, to keep them in repair for 10 years, and to employ for 10 years a miller, a blacksmith, and an experienced farmer "to instruct the Indians in agriculture." In Article 10 (10 Stat. 1045), the Omahas "acknowledge[d] their dependence on the government of the United States, and promise[d] to be friendly with all the citizens thereof, and pledge[d] themselves to commit no depredations on the property of such citizens." In Article 7 (10 Stat. 1045), the United States agreed to protect the

the reservation lying west of a previously granted right of way.

Although Congress also authorized the sale of "surplus" unallotted Omaha lands in the early 1900's, that program was never implemented. See the Act of May 11, 1912, ch. 121, 37 Stat. 111, as amended by the Act of January 7, 1925, ch. 34, 43 Stat. 726. Section 5 of the 1925 Act provided that the disposal of the unallotted lands of the Omaha Reservation "shall not become operative so long as the need thereof exists of maintaining an agency and school for the Omaha Tribe of Indians residing on the Omaha Indian Reservation in the State of Nebraska."

Omahas "from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary."

The Treaty of 1865, 14 Stat. 667, in which the Omahas agreed to cede a portion of their reservation to provide a reservation for the Winnebagos, evidences the same intent that the Omahas would retain and farm their tribal lands."

The federal interest in the Omahas and their Reservation has continued.⁴⁵ The United States continues

"Article II of the Treaty, 14 Stat. 667, provided that the consideration paid to the Omahas could be used to pay "for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation." Article III provided that the services of the blacksmith, miller, and experienced farmer, which the government had agreed to provide for ten years under the earlier treaty, would be extended for an additional ten years. 14 Stat. 668. And Article IV stated that "[t]he Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves," wished to assign a limited portion of their land to the members of the Tribe "to be cultivated and improved for their own individual use and benefit." 14 Stat. 668. The treaty stated that the tracts assigned to individual members "shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress." *Ibid.*

⁴⁵ See also the Act of May 15, 1888, ch. 255, 25 Stat. 150 (appropriating \$70,000 "to enable [the Omaha Tribe] to further improve their condition by making improvements upon their homesteads by the purchase of stock, cattle, agricultural implements, and other necessary articles"), and the Act of February 18, 1909, ch. 145, 35 Stat. 628 (authorizing

to hold the reservation land in trust. The Secretary of the Interior informs us that approximately \$1,000,000 in federal funds was expended on the Omaha Reservation in fiscal year 1979 for management of the trust lands, social services, education, vocational training, and health services. The Omaha Tribe is now organized under a constitution promulgated pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* The Constitution and Bylaws of the Omaha Tribe of Nebraska were approved by the Secretary of the Interior on March 30, 1936. On July 28, 1936, the Secretary submitted a proposed corporate charter for the Tribe, which was ratified by the Tribe in a referendum held on August 22, 1936. The charter provides that "[i]n order to further the economic development" of the Tribe, it was "chartered as a body politic and corporate of the United States of America" and as a "Federal Corporation." Corporate Charter of the Omaha Tribe of Nebraska, ¶¶ 1, 2.

B. Indian Reservations Are Established By And Maintained Under Federal Law, And Federal Law Determines Whether Indian Title To Reservation Lands Has Been Lost Through The Movement Of A River On The Boundary Of A Reservation

1. The choice of law question in this case is governed by *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). The Court held there that

the payment of tribal funds for protecting tribal lands from overflow and for reclaiming tribal lands).

federal law governs tribal rights to Indian lands, since those rights arise under federal law and also are subject to continuing federal protection and supervision.

In *Oneida* the Tribe brought an action in federal district court to recover the fair rental value of land the Tribe alleged it had ceded to the State of New York in 1795 without the consent of the United States that was required by Section 4 of the Non-intercourse Act of July 22, 1790, ch. 33, 1 Stat. 138. The Tribe invoked the district court's federal question jurisdiction under 28 U.S.C. 1331 and 1362. The district court dismissed the case for want of subject matter jurisdiction, holding that a claim for possession of real property arises under state, not federal law, and the court of appeals affirmed (464 F.2d 916).

This Court unanimously reversed. "Accepting the premise of the Court of Appeals that the case was essentially a possessory action," the Court held that the asserted Indian "right to possession [was] conferred by federal law, wholly independent of state law." 414 U.S. at 666. The Court recognized the general principle that "[o]nce [a federal] patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts * * *." 414 U.S. at 676. But it held that Indian title, such as the Oneidas asserted, was different (414 U.S. at 677):

In the present case, however, the assertion of a federal controversy does not rest solely on the

claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.^[40]

⁴⁰ The Court distinguished *Taylor v. Anderson*, 234 U.S. 74 (1914), holding that an individual Indian's suit for ejectment did not arise under federal law, on the ground that that case did not involve a tribal claim to land under continuing federal protection and supervision, but rather a claim based on "[i]ndividual patents * * * with only the right to alienation being restricted for a period of time." 414 U.S. at 676. The claimants in *Taylor* were members of the Five Civilized Tribes, who received fee patents with restraints on alienation, rather than the trust patents issued under the General Allotment Act of 1887, 24 Stat. 388. See F. Cohen, *Handbook of Federal Indian Law* 434-435 (1942). At the time of the *Taylor* decision it may have been appropriate to treat an individual Indian who had received an allotment (or a fee patent subject to restrictions on alienation) like other federal patentees. The government's policy was to allot tribal lands to individual Indians with the expectation that the individual allottees would soon take unrestricted fee title and the reservations would be abolished. See *Mattz v. Arnett*, 412 U.S. 481, 496 (1973); *Handbook of Federal Indian Law*, *supra*, at 206-215. Congress repudiated the allotment policy in 1934, see *id.* at 215-217, and the federal government extended its protective jurisdiction over allotted lands indefinitely. See *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 477-479 (1976); *Mattz v. Arnett*, *supra*, 412 U.S. at 496 n.18.

Mr. Justice Rehnquist in his concurring opinion emphasized the same point (414 U.S. at 684; emphasis in original):

In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility.

Although the specific question in *Oneida* was whether the Tribe's claim presented a federal question for jurisdictional purposes, petitioners ignore the substance of the decision in suggesting (No. 78-161 Br. 24-25) that it left open the question whether federal or state law would be applied after the court's jurisdiction was invoked. The decision in *Oneida* was grounded on "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent" and "the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." 414 U.S. at

670. The Court found that these principles had been expressed in many of its earlier cases. It stated (*id.* at 668) that its decision in *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941), had "succinctly summarized the essence of past cases" as follows:

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer v. United States*, 261 U.S. 219, 227.

Similarly, the Court pointed out (414 U.S. at 671-672) that its decision in *The New York Indians*, 72 U.S. (5 Wall.) 761, 769 (1867), had held that "New York 'possessed no power to deal with Indian rights or title,' " and that accordingly the State's attempt to tax reservation lands was an invalid "interference with Indian possessory rights guaranteed by the Federal Government."

Oneida is fully consistent with the decision three years later in *Corvallis*, *supra* (429 U.S. 363). Both decisions recognize the general rule that once property has passed from federal ownership there is no continuing federal interest, and consequently the incidents of ownership are matters of state property law. *Oneida* establishes that Indian claims of title to reservation land are not subject to state law, despite that general rule, because tribal land is the subject of continuing federal interest and control; indeed, in all but the original 13 States the property generally remains

in federal ownership in trust for the tribe. When a state or other claimants challenge Indian title, the question to be resolved is "'whether a title to land which had once been the property of the United States has passed' " out of federal trust ownership—which is, as the Court in *Corvallis* expressly recognized, a question that "'must be resolved by the laws of the United States.'" 429 U.S. at 377, quoting *Wilcox v. Jackson*, *supra*, 38 U.S. (13 Pet.) at 517 (see pages 51-52, *supra*).⁴⁷

Since the rights of the Omaha Tribe to the portion of its reservation depicted in the Barrett survey arose under and remain subject to the protection of federal law, *Oneida* establishes that the question whether the movement of the Missouri River terminated those rights must be determined by federal law.⁴⁸

⁴⁷ The consistency between the Court's decisions in *Oneida* and *Corvallis* is underscored by the fact that Mr. Justice Rehnquist, who specifically concurred in *Oneida* (414 U.S. at 682-684), wrote the opinion for the Court in *Corvallis* (429 U.S. 363).

⁴⁸ Amici California, *et al.* argue (Br. at 28) that *Oneida* is distinguishable because it involved aboriginal title and the question whether such title had been terminated. This argument is without merit. In the first place, the Omahas had aboriginal title to the lands affected by the 1854 treaty, *Omaha Tribe v. United States*, 4 Ind. Cl. Comm. 627, 664-668 (1957), including the portion they reserved as their reservation. In addition, there is no reason to construe the *Oneida* decision so narrowly; the essence of the decision is that federal law applies to questions of tribal possession of reservation land because of the continuing federal interest in, and protection of, Indian possession of such land; this principle does not vary with the history of the particular reservation.

2. Petitioners contend that notwithstanding this Court's conclusion in *Oneida* that the nature and extent of Indian property rights are, and always have been, matters of federal law, two of this Court's earlier decisions establish a contrary rule that state law generally governs questions regarding Indian property rights. A review of these decisions demonstrates that they did not determine tribal claims to Indian lands and that they offer no support for petitioners' contention that state law governs the question whether tribal title to the Barrett survey area has been terminated.

Petitioners in No. 78-161 place their primary reliance (Br. 22) on *Oklahoma v. Texas*, 258 U.S. 574, 594-595 (1922), quoting a portion of that decision which states that Congress's intent in granting lands lying along the bank of a non-navigable stream will be determined, in the absence of other indications, by looking to state law, even where Congress "is disposing of tribal land of Indians under its guardianship." The case states no broad rule contrary to *Oneida*. The question before the Court was whether federal patents granting former reservation lands to the state, to settlers who entered under the public land laws, and to Indian allottees granted any right to the bed of a non-navigable river. The reservation had included the bed of the river to the middle of the channel. 258 U.S. at 593-594. All of the former reservation had been disposed of by patents that were silent on the question whether rights to the riverbed were conveyed. The state claimed the patents did not

convey any rights to the bed of the river, and that it owned the portion of the bed that had been part of the reservation. 258 U.S. at 594. The United States contended that the patents to the riparian lands were intended to convey the rights to the bed of the river as well. *Ibid.* This Court rejected the state's claim, stating that where no contrary evidence was shown, it would assume that when Congress disposed of federal land—including former reservation land—it intended the incidents of ownership to be determined by state law. *Id.* at 594-595. There was no dispute that Congress had intended to dispose of all the former reservation land, and the Kiowa, Comanche, and Apache tribes did not claim continued tribal ownership of the riverbed. Thus, *Oklahoma v. Texas* follows the general rule, restated in *Oneida*, 414 U.S. at 676, that in the case of lands not subject to continuing federal protection and supervision, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law * * *."

Petitioners in No. 78-160 rely (Br. 47) on *United States v. Oklahoma Gas Co.*, 318 U.S. 206, 210 (1943), which they say requires the application of state law to determine "the incidents of [Indians'] ownership of real property * * * 'in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary.'" Petitioners' reliance is misplaced. The question in *Oklahoma Gas* was whether the state had the authority to license a power company to run its

electric lines along a state highway through a quarter section held in trust for an Indian allottee. The highway was located on the allotted land pursuant to Section 4 of the Act of March 3, 1901, ch. 832, 31 Stat. 1084, which authorized the Secretary of the Interior to grant permission to state authorities "for the opening and establishment of public highways, *in accordance with the laws of the State or Territory in which the lands are situated*" (emphasis added). State law permitted the location of the electric lines as a lawful highway use. The Court's statement (318 U.S. at 210) that it would apply state law "in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary" was made in the light of its recognition that the statute expressly referred to state law as applicable to the "establishment" of the highways, and its acknowledgement that there was "no federal statutory or common-law rule for determining whether the running of the electric service lines here involved was a highway use." 318 U.S. at 209-210.

Even in the face of the express statutory reference to state law, the Court sought to determine whether any federal policy or Indian interest required the application of federal law. It found that the application of federal law was not necessary to protect Indian interests, "for the Indians are subject only to the same rule of law as are others in the State, and then only by permission of the Secretary," subject to what-

ever requirements he deemed it necessary to impose on the highway permits he granted.⁴⁹

3. As the present case illustrates, legal doctrines interpreting the movement of a river can substantially alter Indian land holdings. The case now before the Court involves 2,900 acres "under the sky"⁵⁰ that respondents claim should be restored to the Omaha Reservation, while the Tribe claims an additional 8,000 acres along the same river.⁵¹ The application of state law to deny the Tribe such large areas of valuable farm lands could seriously interfere with the purpose of the reservation, which, as we have noted (pages 56-57, *supra*), was to provide the Omahas with sufficient lands on which they could support them-

⁴⁹ Petitioners (No. 78-161 Br. 22; No. 78-160 Br. 46) also cite *Francis v. Francis*, 203 U.S. 233, 242 (1906), but in that case the Court interpreted a federal treaty as a matter of federal law and "agree[d] with" the earlier decisions of the state supreme court construing the treaty provision. In *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922), which is cited by amici California, *et al.* (Br. 23), this Court rejected the state court's determination of the navigability of a river and held that a state admitted to the Union after an Indian tribe has been granted ownership of the bed of a river may not defeat the tribe's rights with a retroactive rule of property law; the cited portion of the opinion was dictum.

⁵⁰ We adopt this term as used by petitioners in No. 78-160 (Br. 32) to denote an area of specified latitude and longitude, irrespective of the river's movements. It is undisputed that the 2,900 acres under the sky depicted by the Barrett survey, and claimed by the government here, were originally part of the Omaha Reservation.

⁵¹ See page 3, note 2, *supra*.

selves by farming. In an extreme case, a legal interpretation of the movement of a river might affect all the land within a reservation, with the consequence of eliminating the reservation.

Even where less substantial tracts are affected, changes in ownership of land adjacent to a river or stream, resulting from legal conclusions based on the movements of the water course, may have a critical impact on reservation activities such as farming, hunting, or fishing. Such changes in ownership could cut tribal lands off from access to a river that had provided water essential for irrigation, or from accustomed stations for tribal hunting or fishing. For example, when land is gradually built up along the bank of a stream as a result of artificial changes in the stream, most states treat such land as accretion belonging to the owner of the riparian land,⁵² and that is the federal rule. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 327 (1973).⁵³ But decisions in some states hold that lands resulting from such man-made changes in a body of water are state property.⁵⁴ Indeed,

⁵² See 7 R. Powell, *The Law of Real Property* ¶ 984, at 614 (Rev. ed. 1977); 5A G. Thompson, *Commentaries on the Law of Real Property* § 2560, at 604-605 (1957).

⁵³ *Bonelli* was overruled by *Corvallis* insofar as it held that federal law applied, but not insofar as it defined the federal common law rule.

⁵⁴ California defines accretion (or "alluvion") as excluding land not formed by "natural causes." Cal. Civ. Code § 1014 (West 1954) provides that "[w]here, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation

state law might grant all land formed by accretion to the state rather than the riparian landowner. Cf. *Hughes v. Washington*, 389 U.S. 290 (1967) (federal law applied to determine title to ocean front accretions; under state law all accretions subsequent to 1889 belong to the state).

Applying state law doctrines such as these to Indian lands could deprive tribal land of its riparian character and frustrate the purposes for which the reservation was established. Moreover, as these examples suggest, state law may not provide a completely neutral principle for determining the federal rights at issue. There is a substantial financial incentive favoring the adoption of state doctrines that expand state ownership. See *State Land Board v. Corvallis*, *supra*, 429 U.S. at 393 (Marshall, J., dissenting). The results of such a generic incentive may be far more difficult to identify than particular instances in which state law is specifically hostile to federal (or tribal) interests. See, e.g., *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

of material or by the recession of the stream, such land belongs to the owner of the bank * * *." The California courts have generally concluded that accretions caused by artificial conditions belong to the state. See, e.g., *People v. Hecker*, 179 Cal. App. 823, 827-828, 4 Cal. Rptr. 334 (1960); *Long Beach v. Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 428 n.4 (1970) (dictum). Other California cases are collected in Annot., 63 A.L.R. 3d 249, 295-303 (1975). The Arizona Supreme Court reached a similar conclusion in *State v. Bonelli Cattle Co.*, 107 Ariz. 465, 489 P.2d 699 (1971), modified, 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd on other grounds, 414 U.S. 313 (1973).

Here, because of the federal interest in protecting Indian tribal lands, the determination whether the movements of the Missouri River have reduced the size of the Omaha reservation must be governed by federal law. It is true, as petitioners point out (No. 78-160 Br. 50), that state law might be more favorable than federal law to Indian claims in particular cases—as might be the case, they suggest, if the Omaha Tribe were claiming lands by accretion. It may also be true, as petitioners urge (No. 78-161 Br. 25), that in many if not most cases state and federal law will be the same. Indeed, in some cases the federal rule may have been modeled on a state rule that was found to be consistent with federal policy. But as this case demonstrates, there are differences between the law of accretion and avulsion as it prevails in different states and as it has been adopted as a matter of federal common law. Those differences flow from generalized law-making judgments by the courts (or legislatures) of how best to resolve the competing claims arising from the movement of water courses.

For example, some states recognize what has been termed the “doctrine of re-emergence” (see *Bonelli Cattle Co. v. Arizona*, *supra*, 414 U.S. at 330 n.27), under which a riparian owner whose land has been destroyed by gradual erosion, or submerged, is entitled to reclaim new land built up in its place if the boundaries of the owner’s former lands can be identified. See, e.g., *Mikel v. Kerr*, 499 F.2d 1178 (10th Cir. 1974) (Oklahoma law); *Perry v. Irling*, 132

N.W.2d 889 (N.D. 1965). Other states hold that in such circumstances any new land formed is accretion belonging to the owner of the land to which it attaches. See, e.g., *Wilcox v. Pinney*, 250 Iowa 1378, 98 N.W.2d 720 (1959). See generally Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. Rev. 429 (1967) (discussing cases involving reemergence from six states abutting the Missouri River); 7 R. Powell, *The Law of Real Property* ¶ 985, at 616-617 (Rev. ed. 1977). The choice between these two approaches involves a law-making judgment concerning the interests affected. Likewise, the question whether to recognize a presumption in favor of accretion—as Iowa does—is not a mechanical one but involves a policy judgment, a consideration of the interests at stake and the effect the chosen rule of law may have on them.

Where Indian tribal lands are concerned, the federal government—which created the tribal reservations, pursuant to treaty, and which still holds the land in trust for the Indians and exercises continuing protection over both the Indians and the land—has a substantial interest in the protection of such tribal lands and in the effectuation of the purposes for which the reservations were created. Accordingly, the question whether Indian title to a portion of a reservation has been lost must be determined by the application of federal common law, which embodies the sum of federal lawmaking on the issues and interests involved.

C. The Border Of The Omaha Indian Reservation Should Be Determined In Accord With The Federal Common Law Governing River Borders Between Political Jurisdictions

The movements of the Missouri River pertinent to this case occurred before 1927. At that time the boundary between the States of Nebraska and Iowa was the thalweg, or center of the main navigable channel, of the Missouri River. *Nebraska v. Iowa*, 143 U.S. 359 (1892). Since the Omaha Indian Reservation extended to the thalweg (see page 54 & note 11, *supra*), the reservation boundary coincided with the interstate boundary. It follows that the body of federal common law dealing with river borders between neighboring states or other political jurisdictions governed the legal effect of the shift in the river's position on these boundaries.

Petitioners and their supporting amici concede the well-settled rule that federal law governs disputes over the location of interstate boundaries. Indeed, the *Corvallis* decision, on which petitioners place heavy reliance, expressly acknowledged that state law is inapplicable where the shift in a river affects the boundary between two states (429 U.S. at 375):

If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

See generally *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Nebraska v. Iowa*, 143 U.S. 359 (1892).

While recognizing that federal law governs the location of an interstate boundary, petitioners contend that that principle is inapplicable here because of the adoption of the 1943 interstate compact, which established the political boundary between Iowa and Nebraska independent of the future movements of the Missouri River. Petitioners argue that because "[t]his litigation could not possibly affect the boundary between Iowa and Nebraska as it presently exists," this basis for applying federal law has been removed (No. 78-161 Br. 19; see also No. 78-160 Br. 44-45). Petitioners in No. 78-160 concede (Br. 44) that "if these cases had been litigated prior to 1943, they might have involved a determination of the boundary between Iowa and Nebraska," so that federal law would apply.⁵⁵ But they urge that the

⁵⁵ Amici California, *et al.* disagree with this concession. They urge (Br. 18-19) that if the dispute arose before 1943, the location of the interstate boundary would have been resolved by the application of federal law, but disputes over title to land would then be resolved by the application of state property law. To the contrary, conflicting claims of sovereign title to property, as well as disputes over political boundaries, have been resolved in this Court by the application of federal law. See, *e.g.*, *Texas v. Louisiana*, 410 U.S. 702, 703 (1973). Similarly, federal law governs conflicting state claims over the apportionment of water in an interstate stream. *Hindlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 408 & n.119 (1964). Accordingly, if the dispute had been litigated prior to 1943, federal law would have been applied to determine the boundary of both the State of Iowa's political jurisdiction and its sovereign title to the bed of the Missouri River, which would have been coextensive, and the remainder of the bed

interstate compact, as construed in *Nebraska v. Iowa*, 406 U.S. 117 (1972), eliminates this ground for applying federal law.

But the compact, as this Court construed it in *Nebraska v. Iowa*, provides no support for the claim that state law may now be applied to defeat tribal title that would have been valid under federal law if the question had been litigated prior to 1943. As this Court construed Sections 2 and 3 of the compact, each state is obligated to recognize title to land affected by the boundary change if title was "good in" the other state prior to 1943. 406 U.S. at 120, 122. Accordingly, if the Tribe's title would have been valid under federal law—and thus "good in" both Iowa and Nebraska prior to 1943—the compact requires the states to recognize that title. The compact itself thus disposes of petitioners' argument that tribal title "good in" both states prior to 1943 may now be held invalid under state law.

In the present case, moreover, there is an additional reason for applying federal law: Whatever may be said about the interstate boundary, this case plainly will determine the boundary of the Omaha Indian Reservation. As this Court has recently reaffirmed, Indian tribes "remain 'a separate people, with the power of regulating their internal and social relations.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978), quoting *United States v. Kagama*, 118

U.S. 375, 381-382 (1886). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, *supra*, 435 U.S. at 323. Indian tribes are political entities "subject to the general jurisdictional principles" that absent federal legislation to the contrary, "state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Williams v. Lee*, 358 U.S. 217, 220." *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388 (Jan. 16, 1979), slip op. 6. Since the reservation lands were granted to the Omaha Tribe as a "political society," the determination of the reservation's boundary should be governed by the principles for determining the "boundary between nations or States.'" *Barney v. Keokuk*, 97 U.S. 324, 331 (1876), quoting *Haight v. City of Keokuk*, 4 Iowa 199 (1856); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 n.8 (1970). Cf. 18 Op. Att'y Gen. 230, 231 (1885).

would have been the property of the Omaha Indian Tribe whose reservation extends to the thalweg of the river.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

October Term, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN,
FLORENCE LAKIN, HAROLD JACKSON, DARRELL
L., HAROLD, HAROLD M. AND LUEA SORENSON,
Petitioners,

R. G. P. INCORPORATED, OTIS PETERSON,
TRAVELERS INSURANCE COMPANY, STATE OF
IOWA AND STATE CONSERVATION COMMISSION
OF THE STATE OF IOWA,

Respondents (Petitioners on separate petitions),

vs.

OMAHA INDIAN TRIBE AND
UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals on the Eighth Circuit

REPLY BRIEF OF ABOVE PETITIONERS

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—o—

REPLY BRIEF OF ABOVE PETITIONERS
—o—

A. Reply to Brief of United States.

The following points are made with respect to arguments related to the construction of Section 194 found in the briefs of the United States and the Amici in support of the respondents. References to ALTA amicus brief are to the brief of American Land Title Association.

1. The brief of the United States is replete with the suggestion that "doubtful expressions" must be resolved in favor of the Indians, that it is "plainly insuf-

ficient to justify a narrow reading of a provision intended by Congress to protect the Indian people." (See, for example, pp. 24-25, 28, 32, 37, 40-41, 43-44.) In fact, it may be fairly said that this is the crux of the government's entire case. However, inasmuch as Congress chose not to include Indian tribes or the United States within the scope of Section 194 and chose as well to limit its application to cases in which only "white persons" were on the other side, clearly "... the courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people." *United States v. First National Bank*, 234 U.S. 245, 262 (1914); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977).

2. The United States (25-26) and Amici (26) rely upon 1 U.S.C. § 1 to argue that the use of the singular term "an Indian" provides "no basis" for a restrictive interpretation of Section 194 "since singular and plural terms are generally used interchangeably in federal statutes." However, by its own terms 1 U.S.C. § 1 is inapplicable here for the general rules of construction set forth therein are to apply "unless the context shows that such words were intended to be used in a more limited sense." In this case the context clearly indicates an intention to use the word "Indian" in a more limited sense—the use of the singular word "himself" in obvious relation to the word "Indian," the change from the plural "Indians" to the singular "Indian" in 1834, other references in the 1834 Trade and Intercourse Act demonstrating that "an Indian" or "Indian" refer to an Indian individually and not to a tribe or to the United

States, the lack of interchangeability in the 1834 Act between the phrase "an Indian" and "Indian tribe," the provisions elsewhere in the 1834 Act for the property interests of an "Indian tribe" and the general distinction in 1834 between the litigation rights of Indians individually and Indian tribes. (See ALTA amicus brief, 11-15.) As this Court has held, the construction suggested by 1 U.S.C. § 1 is "not one to be applied except where it is necessary to carry out the evident intent of the statute." *First National Bank v. Missouri*, 263 U.S. 640, 657 (1924). Moreover, 1 U.S.C. § 1 merely provides that, unless otherwise intended, "words importing the singular number may extend and be applied to several persons or things" Such a rule does not contemplate the extension of the term "Indian" to include an "Indian tribe" which is a distinctly different and separate entity. (See ALTA amicus brief, 8-9.)

3. Although the United States attempts to support its argument that the term "white person" as used in the 1834 Act means "all non-Indians" by a comparative analysis with other sections of the Act (33-35), it ignores what such a comparative analysis indicates with respect to the meaning of the phrase "an Indian." Apparently it chose to do so because such an analysis clearly demonstrates that each reference in the 1834 Act to "an Indian" or "Indian" refers to an Indian individually and not to an Indian tribe or to the United States as trustee for the tribe. (ALTA amicus brief, 12-13.) It is well established that when the same term is used in different sections of the same statute, it is generally presumed to mean the same thing. (See cases cited, ALTA amicus brief, 12, 17.)

4. The United States (26-28 and Amici (27) claim that petitioners' construction of Section 194 would lead "... to the anomalous result that the burden of proof would differ in cases involving precisely the same substantive claims depending on who was the formal party to the suit." Such an argument misrepresents the position of petitioners. Section 194 is inapplicable herein because the Omaha Tribe and the United States, as trustee, are not "an Indian" *nor* are they litigating about the individually held property rights of an Indian. (ALTA amicus brief, 9.) Although we would not agree that the United States, as trustee, or a tribe may assert a claim on behalf of an individual Indian in litigation about his own "right of property," application of Section 194 does not turn, as the government suggests, upon "who was the formal party to the suit" but upon who was the real party in interest. That test is no different were a tribe to purport to assign its tribal land or the tribal claim for that land to individual Indians. (Amici, 27.)

5. The government asserts (26) that "the purpose of Section 194 . . . is equally applicable when a tribe, rather than an individual Indian, is a party, or when the United States brings suit as trustee for Indians." However, it is apparent that Section 194 was originally designed to remedy certain litigation obstacles encountered by individual Indians in cases against "white persons." (ALTA amicus brief, 7, 18.) It cannot be seriously argued that those obstacles continue to exist for the individual Indian given subsequent legislation directed toward the assurance of equal opportunity in litigation premised upon a universal basis and not limited

to any particular group. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1970). However, as this case itself aptly demonstrates, tribal claims to land are undertaken by the federal government or by the tribe itself or by both with significant resources and competent legal talent and therefore there is no present need to broadly interpret the scope of Section 194 beyond its terms.

6. The United States (30-32) and Amici (26) suggest that the difference between the burden of proof section as added to the 1802 Act by amendment in 1822 and as it read in the 1834 Act was merely a matter of "syntax," the 1822 version having been "somewhat awkward." They fail to explain, however, why Congress would not simply have changed "himself" to "themselves" and to have made the statute expressly applicable to "Indian tribes" *if* a broader application were intended *and if* "syntax" were the only concern.

7. The United States in effect concedes that there is no specific legislative comment concerning the meaning or purpose of Section 194. However, the government's brief states that the 1834 Act "appears to have been an outgrowth" of the Clark-Cass report made some five years earlier which report "indicates" that no changes were contemplated" by the change in language in the burden of proof section between the 1802 Act (as amended in 1822) and the 1834 Act (29). In fact, a review of the Clark-Cass report demonstrates that the government's reliance is misplaced. The annotation in the report with respect to Section 194 (Section 27 of the report) simply states that "[t]his enactment is taken from the fourth section of the act of May 6, 1822." Although the govern-

ment suggests (29, n.23) that in other sections of the proposed statute "where significant change was intended, the annotations so indicated," in fact that was not consistently the case. As the government itself concedes, Section 12 of the 1834 Act no longer required that conveyances by individual Indians be made by treaty as did the 1802 Act. Section 12, as it was enacted in the 1834 Act, is set out as Section 41 of the 1829 report, and the accompanying annotation merely states: "This is the 12th section of the last mentioned act" [the act of March 30, 1802].

8. The government argues that any connection between the 1834 exclusion of individual Indians from Section 12 and the limitation of the application of Section 22 (Section 194) to those cases in which "an Indian" was a party on one side is "at best, speculation." However, the government offers no evidence that these consistent changes were "wholly independent." Nor does the government respond to the differences in the nineteenth century between the general litigation ability of tribes on the one hand and individual Indians on the other, a distinction which Congress may also have had in mind in effectuating these changes. (ALTA brief, 15.)

9. The United States urges that an interpretation of the term "white person" to refer only to an individual of the Caucasian race "should be rejected because it is at odds with Congress' intent to protect Indians from the loss of their lands to non-Indians" (32) and "would make the applicability of the section turn on factors wholly irrelevant to Congress' purposes in enacting it." (50-51). However, "[t]he responsibility for the justice or wisdom of legislation rests with the Congress; and it is the pro-

vince of the courts to enforce, not to make, the laws." *First National Bank, supra*, 234 U. S. at 260.

10. The United States suggests that Congress used the phrase "white person" in several sections of the 1834 Act "in contexts where it was clearly intended to refer to all non-Indians" (33-35). However, the examples they cite do not support their conclusion. It is not self-evident that the phrase "white person" in Section 20 was intended to include any non-Indian inasmuch as the authorization to search for suspected liquor may not have been intended to effectuate the prohibition in the first portion of the section with respect to all those within the prohibition. Similarly the reference in Section 7 to goods "of the kind commonly obtained by the Indians in their intercourse with the white people" is simply descriptive of the kind of goods to which the statute was intended to extend and may not be fairly equated with "any person other than an Indian" which persons are subject to the statute.

11. After arguing for a few pages (30-35) that a comparative analysis with other sections of the 1834 Act proves that "white person" was "evidently equated" with non-Indians, the government then argues for a few more pages (35-37) that Congress was so inconsistent in the use of various terms and phrases in the Act that a comparative analysis is useless. In support of the latter discussion various provisions are referred to which utilized the term "person" which the government contends at times included Indians and at times did not. However, clearly the term "white person" was more narrowly drawn and in no place in the 1834 Act included all "non-Indians."

12. The government attempts to distinguish *United States v. Perryman*, 100 U.S. 235 (1879) by suggesting that the meaning of "white person" in Section 16 does not govern its meaning in Section 22 and because "*Perryman* was grounded upon the peculiar legislative history of Section 16." However, there is no reason to construe the term "white person" as found in Section 22 of the 1834 Act to have a different meaning than the same term has in Section 16 of the same Act. Moreover, the language of Section 194 did meet a "peculiar legislative purpose;" namely, the fact that the problems individual Indians then encountered in litigation would usually have arisen when a "white person" was "on the other side." (ALTA amicus brief, 18.)

13. The United States (39-41) and Amici (24) concede that an interpretation of the term "white person" as including only Caucasians would raise "serious doubts" about the constitutionality of Section 194 "which can and should be avoided by construing the term to meaning "non-Indians." However, it is axiomatic that the language of the statute and the intention of Congress in enacting it may not simply be ignored in order to save a statute's constitutionality. As this Court has said in rejecting a similar contention in *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926):

We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.

See also, *United States v. International Union*, 352 U.S. 567, 589 (1957); *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964). Furthermore, if the term "white person" includes only Caucasians, the Court need not presently consider the constitutional question. On the other hand, if the term applies to all "non-Indians," the statute still is of doubtful constitutionality. (See ALTA certiorari brief.)

14. The United States argues that petitioners and their amici "greatly overestimate the impact Section 194 is likely to have" because most, if not all, cases cited are suits based upon the Indian Trade and Intercourse Act and "[t]he central issues in virtually all of these cases are issues of law . . ." (48-50). This argument grossly oversimplifies the nature of Indian land claims litigation and ignores the decisive role Section 194 might have in the resolution of those claims, particularly because the events complained of occurred so many years ago.

The Justice Department has elsewhere described Indian land claims litigation instituted under the provisions of the Indian Trade and Intercourse Act as "potentially the most complex litigation ever brought in the federal courts." Memorandum in Support of Plaintiff's Motion for Further Extension of Time to Report to the Court at 3-4, 5, *United States v. Maine*, Civil Nos. 1966-ND, 1969-ND (D. Me.). Those elements which a plaintiff tribe must show in order to establish a prima facie case include: (1) that it is or represents an Indian "tribe" within the meaning of the Act; (2) that the parcels of land at issue are covered by the Act as tribal land; (3) that the United States has never consented to the alienation of the tribal land; (4) that the trust relationship between the United

States and the tribe has never been terminated or abandoned. *Narraganset Tribe of Indians v. Southern Rhode Island Land Development Corp., et al.*, 418 F. Supp. 798, 803 (D. R. I. 1976); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 428 F.2d 370 (1st Cir. 1975). Among numerous defenses to such claims are whether whatever interest the tribe once had in the lands at issue was lost by abandonment, laches or prescription, whether the defendants were such bona fide purchasers as to preclude recovery by the tribe. Obviously many of these issues and others which would have to be litigated are factual in nature in whole or in part and might well be ultimately determined by the operation of the burden of proof. That the United States would in one place in its brief state that Section 194 operates to place upon the "non-Indians" the burden of proving "whatever facts are necessary to show that Indian title was extinguished and good title vested in the non-Indian claimant" (46) and then later suggest that the petitioners and their amici "greatly overestimate" the potential impact of Section 194 (49) is difficult to comprehend.

B. Reply to Brief of Native American Rights Fund.

Re-emergence Doctrine

At page 23 of the brief of the Native American Rights Fund, it is stated: "Everyone agrees that the 2900 disputed acres were once riparian, that they were covered with water and eroded, and that they subsequently re-emerged on the opposite side of the Missouri River as a result of a change in the river's course. The Re-emergence Doctrine should be applied in these circumstances to give effect to the purposes of the Omaha Indian Reserva-

tion, to prevent the extinguishment of Indian title without federal consent, and to avoid a windfall to the petitioners."

With regard to the windfall, Lakin paid \$300,000 for the Blackbird Bend property he bought and invested another \$700,000 clearing it and otherwise developing it for agriculture (R.2383). Wilson bought most of Lakin's Blackbird Bend property for \$1,685,000 (R.2327). The windfall in this case is going to the Omaha Tribe under the Eighth Circuit decision. The Tribe lost land much of it of little value, and under the Court of Appeals' opinion, gets, in return, land of great value, made so in large part by the investment of the defendants and their predecessors in title.

As to the Re-emergence Doctrine—it has never been applied in such a case as this case. It applies only where the land re-emerges on the same side of the river as before, identifiable and in the same position relative to the river and other land as before. In *Beaver v. United States*, 350 F. 2d 4, at 11 (1965), the Court said:

As an alternative theory of recovery, appellants raised a title claim under the doctrine of re-emergence. That doctrine rests upon "easy identification" of riparian land "lost" and "found" again by re-emergence from the stream bed. These elements are not here present.

We agree with the government:

"That doctrine has been applied by some state courts as an exception to the doctrine of accretion, but not in a factual situation such as is present in this case. In order for the doctrine to be applied in those states that recognize it, two things must occur: First, the water-course must move across and submerge

riparian land so that land formerly nonriparian is made riparian; then the watercourse must return to or near its original bed so that the riparian land that had been submerged is uncovered, or re-emerges.

• • •

"The United States' land to which the tract has accreted was riparian originally and one of the reasons for the doctrine of accretion is to allow that land to remain riparian. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 [32 S.Ct. 340, 56 L.Ed. 570] (1912). Appellants here seek to apply the 're-emergence' doctrine to render nonriparian land that was originally riparian. This is directly contrary to the purposes of the exception.

• • •

"*Stone v. McFarlin*, 249 F. 2d 54, 55-57 (C.A. 10, 1957), cert. den., 355 U.S. 955 [78 S.Ct. 540, 2 L.Ed. 2d 531] * * * *Anderson-Tully Co. v. Tingle*, 166 F. 2d 224 (C.A. 5, 1948), cert. den., 335 U.S. 816 [69 S.Ct. 36, 93 L.Ed. 371], where the court stated (pp. 228-229): 'Where a river is a boundary and there is no avulsion, a land-owner can never cross the river to claim an accretion on the other side.' (Appellee's Brief, pp. 15-17.)

Title To Bed of River

At page 20 of the Native American Rights Fund brief, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 25 L.Ed. 2d 615, 90 S.Ct. 1328 (1970) is cited as holding that title to the beds of navigable rivers was vested in the Indian tribes. That case did hold that certain treaties between the United States and the Tribes did convey to the Tribes the bed of the Arkansas River even where that river was navigable. Both sides of the river were conveyed to the Tribes by some of the treaties, and one of them

described the boundary as "down the main channel of the Arkansas River". The Court said (397 U.S. 625):

Finally, it must be remembered that the United States accompanied its grants to petitioners with the promise that "no part of the land granted to them shall ever be embraced in any Territory or State." In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding, on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.

The question of whether the United States, pursuant to the Treaty of 1854, conveyed the west side of the Missouri River bed to the Omaha Tribe is not a crucial issue in this case. But, it may be of some help in analyzing the Eighth Circuit's opinion in which that Court said (App. A.20): "Because the Tribe's right asserted to Indian trust land arises under federal law, we hold that the governing law is federal law." But, if the bed of the river was not conveyed by the United States to the Tribe but came to the Tribe under the law of Nebraska, then the ground given by the Eighth Circuit for its decision fails as to the shore of the Barrett Survey Area. That the law of Nebraska gave the bed of the Missouri River west of the middle of the main channel to the riparian owners was determined by the decision of the Supreme Court of Nebraska in *Kinkead v. Turgeon*, 74 Neb. 573, 104 N.W. 1061 (1905) and 74 Neb. 580, 109 N.W. 744 (1906).

The Treaty of 1854 did not fix the eastern boundary of the Reservation or locate the Reservation. It was later located and described by the surveyor Barnum with

its eastern boundary as the river (A.269, 270). The Treaty of 1854 unlike the treaties in the *Choctaw* case *supra*, contained no guarantee that the Reservation would not be embraced within a state. In view of the difference in the treaties and the closer analysis of the equal protection doctrine made in *Oregon v. Corvallis*, we think the Tribe did, indeed, acquire title to the river bed from the State of Nebraska, not from the United States.

C. Reply to Brief of Omaha Tribe.

The Petition for Certiorari of Wilson, et al. (No. 160) presented five questions for review. This Court granted certiorari limited to Questions 2 and 3. Nevertheless, Tribe's counsel in his brief presents seven questions for review of which Nos. 1 and 7 appear to be the equivalent of Petitioners' No. 5 which this Court did not undertake to review. It reads as follows:

Whether the Court of Appeals erred in holding that the District Court's determination that Petitioners had proved by a preponderance of the evidence that the land in question is accretion to the Iowa riparian land or to the State of Iowa's portion of the bed of the river, is clearly erroneous.

Since we think Tribe's counsel is out of order in devoting two-thirds of his brief to argue a question that this Court did not choose to review, we will not undertake a full-scale reply to his argument on that subject. But, we would like to correct a few of the misstatements of fact in the Tribe's brief.

The Barrett 1867 Survey and Meander Line

At Page 9 of the Tribe's brief, it is asserted that the Barrett Survey was made during a period of extremely high water. There is no evidence to support such a claim. The regular high water periods of the Missouri occur in April (for a week or ten days) and in June (App.A.29,n.27). Barrett had surveyed the higher part of the Barrett Survey Area by April 19, but then he could not survey the lower part because it was inundated. He waited for the high water to recede and then he returned and surveyed the lower part of the peninsula on May 16, 1867. May is not normally a high water period. Even the Court of Appeals said that "Barrett's Survey established a meander line for the Nebraska *shore* of the Missouri River," (Emphasis ours) (App. A.5, n.3), not the bank or the ordinary high water mark. The eastern one and one-half miles or thereabouts of the Barrett Survey Area was described by Barrett on his map as "low sandy point" (T.Ex.26, 26a, R.20, 22). Some typical excerpts from Barrett's notes are (T.Ex.26d, 26e, R.20, 22).

The east part of Section 13 and most of fractional Section 24 is low and sandy and subject to frequent inundations, entirely worthless for cultivation.

* * *

Level and sandy, subject to frequent inundations.

* * *

Worthless for cultivation being almost entirely sand.

* * *

A mound was built but owing to the sand and frequent inundations it cannot long remain. Soil—sand.

* * *

The mounds on this line will not long remain. No permanent corner can be established. . . . low and level—soil worthless for cultivation being almost entirely sand.

This low sandy point was shore. It was below the ordinary high water mark, the line below which the land is submerged long enough each year to prevent upland type vegetation from growing on it. The meaning of "ordinary high water mark" is explained in *State, ex rel O'Connor, Attorney General, et al v. Sorenson, et al*, 222 Iowa 1248, 271 N.W. 234 (1937), as follows:

One of the controverted questions herein relates to the location of the present high-water mark along the property in question. An accepted definition of "high-water mark" is set out in the case of *City of Cedar Rapids v. Marshall*, 199 Iowa 1262, loc. cit. 1264, 203 N.W. 932, 933, where this court said: "The term 'ordinary high-water mark' has been frequently defined by this and many other courts. It is not the line reached by unusual floods, but it is the line to which high water ordinarily reaches. [Citing case.] "'High-water mark' means what its language imports—a water mark. It is coordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes." * * * *Bennett v. National Starch Mfg. Co.*, 103 Iowa 207, 72 N.W. 507; * * * *Houghton v. C., D. & M. R. Co.*, 47 Iowa 370."

Other cases are collected in *Words and Phrases* under "bed" and under "ordinary high water mark."

The shore portion of the Barrett Survey Area would be about 1,000 acres. No allotments were made of that area to individual Indians. It was worthless for agri-

culture. Trust allotments were made in the western part of the Barrett Survey Area, and in 1907, the river started eroding them away as the meander point at the northern edge of the Blackbird Bend Area started its southward migration. Between 1907 and 1927, all of the allotted lands were washed down the river and those which had not been converted into fee patented lands had been relinquished back to the Tribe in exchange for new allotments on higher ground. See, Wilson Exhibits A through P (R.104, 106, 110), Wilson Exhibit F4 (R.2059, 2061), Wilson Exhibit R (R.535, 592).

The 1879 Missouri River Commission Map

A copy of this map is shown in the Tribe's brief as Plate II on Page 13, but it does not have the retracement of the Barrett Survey of 1867 meander line superimposed on it. The copy in the Court of Appeals' opinion at App. A.11 does. Tribe's counsel asserts that this map was made during a period of "extremely high flow", "flood stage", "out of its banks". (Tribe's brief, Page 12). The Court of Appeals believed that claim (App. A.45). It said that the 1879 map was made when the River was as much as five feet above its ordinary high water level. It says, "The existence or non-existence of identifiable land in place could not have been accurately assessed at a time when the river's flow was abnormally high during floods which completely inundated the adjacent land." (App. A.46).

The 1879 map bears the notation, "surveyed June 16-26, 1879, Stage-high water." "High water" does not mean five feet above ordinary high water. It does not mean "abnormally high during floods which completely

inundated the adjacent land." If the river had been at flood state, the mapmaker would have so described it, "flood stage", not "high water." The Court of Appeals mistakenly accepted the Tribe's surveyors definition of ordinary high water.

Mr. Clark testified that for at least six months of the year, the river was considerably lower than its June 16 to 22, 1879 elevation. In plotting his high water mark on his Tribe's Exhibit 98, he reduced the water surface elevation of the river below that on Tribe's Exhibit 29, between 4 and 5 feet on each of the cross-sections. He said, "and this is as the water elevation of the river would usually be for the remaining—or at least six months of the year at these three areas." (R.281, 284). Clark thought that in using a surface level at or below which the water would be at least six months of the year, his surface level represented the ordinary high water mark used in a court of law to determine rights of riparian owners (R.285). He was wrong about that. But, five feet above the mean level for the year would not be flood stage or extremely high water on the Missouri River. The Government's expert, McQuivey, testified that the discharge at Sioux City for the period of June 16 to June 26, 1879 was approximately 160,000 cubic feet per second, high water not a flood (R.1493). The high discharge for 1879 was 220,000 cubic feet per second. The flood of 1881 had a maximum discharge of 600,000 cubic feet per second (R.1507). High discharge of 1876 was 300,000 cubic feet per second; for 1877, 200,000 cubic feet per second; and for 1878, 215,000 cubic feet per second (R.2943; App. A.42, n.41). So the discharge at the time the map was made was only two-thirds that of the high discharge of 1879 and very much

below the high discharge for each of the preceding years. Furthermore, if the river were at flood stage—out of its banks—during June 16 through June 26, 1879, when the 1879 survey was made, it would have covered the accretions laid down since 1867, not only Bar A, which even the Court of Appeals concedes was "land formed by deposition after the channel was abandoned (App. A.43), but accretions to the Nebraska shore in Sections 11 and 23 east of the Barrett meander line. It is noteworthy that those areas of Sections 11 and 23, as well as Bars A and C are shown with willows. Although the Court of Appeals concedes that Bar A was formed by deposition in the abandoned channel, and although the land or shore areas in Nebraska east of the Barrett meander line in Nebraska Sections 11 and 23 obviously were formed by deposition after 1867, the Court of Appeals considered that the existence of willows on Bar C (App. A.44), supported the "possibility that Bar C, located on the eastern end of the lobe, was the same surface area described by Barrett in his notes and was not built up by accretive deposits (App. A.44). Yet, there is nothing to indicate that the willows on Bar C were any older than those on Bar A or in Sections 11 and 23 east of the Barrett meander line. The sandbar willows are shrubs (Gorsuch, R.1391) which start to grow as soon as the seeds hit the sandbar and the water recedes (R.1390). They grow to as much as 10 inches the first year and 15 the next and so on (R.1391). The United States Engineers would show them on a map as soon as they are visible—about 12 inches high (Huber, R.2153).

Another mistake of fact was made by the Court of Appeals with respect to Bar C. The Court of Appeals said (App. A.43-44):

The trial court also found that the land which had previously occupied the area shown as bar C on the 1879 map had been completely eroded away and that bar C had formed thereafter as a middle bar as the thalweg moved to the west. The Court observed: "If bar 'C' were land-in place which had existed prior to 1879, it would have supported the growth of cottonwoods or other vegetation more substantial than willows by 1890."

The 1890 reference is confusing and in obvious error. The area where bar C was located in 1879 is depicted on the 1890 map as "cleared" land.

The area where bar C was located in 1879 is not depicted on the 1890 map as "cleared" land. A comparison of Plate II (App. A.11), which is a copy of the 1879 map, and Plate V (App. A.57), which is Clark's composite of the 1890 map with Clark's omissions and additions, shows that the space marked by Clark "cleared" is in the northwest corner of Section 20, while the area of bar C is in the northeast corner of Section 19. The original 1890 map (W.Ex.P.3, R.1814, 1815; T.Ex.32, R.306, 307) shows the symbol for willows on the area formerly bar C as well as in the area north, south and west of the bar C area.

Another point to consider with reference to the 1879 map is that between 1867 and 1879, the thalweg in Blackbird Bend was shortened by about three miles. Shortening the channel steepens its slope and increases the speed of the water which, in turn increases its scour on the bottom and deepens the channel. Except for such degradation of the channel the bars shown on the 1879 map could very well have been submerged and therefore not shown on the map at all.

Joe Kirk, Squatter?

For some vague purpose, Tribe's counsel hurls the epitaph "squatter" at Joe Kirk, deceased, who assembled title to most of the land in the Blackbird Bend Area. Mr. Kirk purchased land on the north high bank (the north half of the southeast quarter of Section 19, marked RGP, Inc. near the top of the map, which is Appendix F on the back cover of the white Appendix). In 1916, he built a cabin on the bar land south of his high bank land, and made it clear that he claimed it as accretion to his formerly riparian land. He quieted title in 1928 against one claimant. Over a period of time, he assembled the accretion land by getting quitclaim deeds and line fence agreements from other riparian landowners to the accretions to their land. In the Wilson abstracts and chain of title (W.Ex.W, Y, R.1787, 1791) we count ten patents issued by the United States to different tracts of high bank land through which Wilson traces his title, and in the chain of title and abstracts of RGP, Inc. (W.Ex.X, Z, R.1787, 1791) we count five such patents back to which RGP, Inc.'s title is traced.

Iowa's Ownership of the Bed of the River

When Iowa became a state, it became the owner of the bed of the Missouri River from the ordinary high water mark on the Iowa side of the river to the middle of the main channel. It did not relinquish that ownership. The significance of that ownership so far as Wilson, Lakin and RGP, Inc. are concerned can be briefly explained. If a sandbar had surfaced on the Iowa side of the thalweg and while still a sandbar became attached

to the riparian land, ownership would be acquired by the riparian landowner as accretion to his land if and when the sandbar arose above the ordinary high water mark and achieved the status of fast land. On the other hand, if the sandbar became an island, that is, arose above the ordinary high water mark and evidenced its permanence by acquiring vegetation and suitability for cultivation before becoming attached to the riparian land, it would still be the property of the state after becoming so attached. In some cases there has been difficulty in determining the ownership as between the state and the riparian owner. In Blackbird Bend, settlement of that question was reached between the state and the Petersons and Lakin. Those private owners gave quit-claim deeds to the state to the land now claimed by the state, and the state withdrew its objections to quiet title decrees being entered against it as to the land now claimed by Lakin, Wilson and RGP, Inc. The result is that the state derives its title to the same land as accretion to the riverbed owned by it *and* as accretion to the riparian land, and Wilson, Lakin and RGP also derived their title both through the state and through the riparian owners. If their title is good through either source, it is good.

*Tribe's Claim that Defendants Assumed
Burden of Proof by Their Pleading*

Counsel for the Omaha Tribe asserts that the defendants assumed the risk of nonpersuasion independently of Section 194 because defendants alleged that they are owners of the Barrett Survey Area as accretion to the Iowa riparian land. Counsel for the tribe assert that

that allegation presents an affirmative defense and that under Iowa law, defendants have the burden of establishing their affirmative defenses. But counsel for the Tribe does not cite any authority to the effect that a claim of ownership of land as accretion to riparian land is an affirmative defense.

An affirmative defense is one which admits the facts of the adverse pleading but seeks to avoid their legal effect. *See* Rule 101, Iowa Rules of Civil Procedure; *Foods Inc. v. Leffler*, — Iowa —, 240 N.W. 2d 914, 920 (1976); Federal Rules of Civil Procedure, Rule 8(c).

Accretion would be provable under a general denial. Indeed, defendants denied that plaintiffs now own or ever owned the land in controversy because it is not the same land which occupied the particular area of latitude and longitude in 1867 but is new and different land deposited as accretion to the Iowa riparian land. *See Beaver v. United States*, 350 F. 2d 4 (C.A. 9, 1965), our principal brief, page 33. *Wilcox v. Pinney*, 250 Iowa 1378, 98 N.W. 2d 722 (1959), cited in Tribe's brief at page 60, footnote 132, was one where both plaintiffs and defendant were or had been owners of land on the Iowa side of the river. The successful defendant and counter-claimant proved that plaintiffs' riparian land was entirely destroyed (eroded to below ordinary high water mark) so that defendant's land behind it became riparian and the accretions belonged to the defendant. Tribe's counsel's contention is inconsistent with the rule well established in Iowa and in this Court that there is a strong presumption founded on long experience and observation that the movement of a river has occurred by gradual

erosion and accretion rather than avulsion (see the Wilson principal brief at pages 39 and 40).

Once again, it seems appropriate to remind counsel for the Tribe that the Court of Appeals did not say that plaintiffs had sustained any burden of proof. It said:

Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. *Presumptively*, at least, this right has never been extinguished. (Emphasis ours.) (App. A.17, see also App. A.25).

* * *

We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194 (App. A.62).

* * *

Under the circumstances we hold that the defendants have failed in sustaining their burden of proof under § 194 (App. A.65).

* * *

Although it is possible that the land represented by bar C may have completely eroded, . . . the record is insufficient to prove what actually occurred (App. A.44).

* * *

None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstances shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion (App. A.49).

* * *

These established facts do not prove that either accretion or avulsion caused the river's movement (App. A.62).

* * *

We conclude on the basis of an overall review of the record that it is entirely speculative to determine

when or how the thalweg moved to the position shown on the 1923 map (App. A.65).

Respectfully submitted,

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DEC 27 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-160, 78-161

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN,
R.G.P. INCORPORATED, DARRELL L. HAROLD, HAROLD M.
AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON,
TRAVELERS INSURANCE COMPANY, STATE OF IOWA, AND
STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

v.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

Brief of Title Insurance and Trust Company and Pioneer National Title Insurance Company as Amici Curiae in Support of Petitioners

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Errata

Page ii, line 15 : *aff'd* should be *aff'g*
 Page ii, line 22 : Ritte should be Ritter
 Page iii, line 16 : F.2f should be F.2d

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In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-160, 78-161

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN,
R.G.P. INCORPORATED, DARRELL L. HAROLD, HAROLD M.
AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON,
TRAVELERS INSURANCE COMPANY, STATE OF IOWA, AND
STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,
Petitioners,

v.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**Brief of Title Insurance and Trust Company and
Pioneer National Title Insurance Company as
Amici Curiae in Support of Petitioners**

STATEMENT OF INTEREST OF AMICI CURIAE¹

Amicus curiae Title Insurance and Trust Company (hereafter referred to as "TI") insures land titles in California,

1. Attorneys for all of the parties in Nos. 78-160 and 78-161 have consented in writing to the filing of this amicus brief. Copies of the consents have been filed with this brief.

Nevada and Hawaii. TI is the largest insurer of land titles in the State of California, and accounts for 9.1% of the title insurance issued in the United States. Amicus curiae Pioneer National Title Insurance Company (hereafter referred to as "PNTI") operates in forty-nine states and insures 9.3% of the land titles in the United States.² TI and PNTI are part of the TICOR group of title insurance companies and collectively represent the largest insurer of land titles in the country.³ Amici have insured numerous properties throughout the country which adjoin Indian reservations. There are well over a hundred reservations which have a navigable river as their common boundary with privately owned property. A map showing these reservations is attached as an appendix to this brief.

By its very nature, the ability of purchasers to obtain title insurance is essential to the success of any transfer of title. Consequently, the ability of amici to insure titles in a reliable fashion based upon stable and predictable rules of law is fundamental to the title insurance business and to the transfer of real property in general.

The decision of the Eighth Circuit is a radical departure from the rule repeatedly announced by this Court that state law governs land title matters. The Court of Appeals improperly carved out an exception to this rule by making

2. Figures for the percentage of title insurance policies issued represent the calendar year 1977. Figures are not available for 1978.

3. TI has no existing or potential monetary interest in the outcome of this litigation. PNTI could have a direct interest in the future if there should be a loss of title by the private parties. Such interest would arise by reason of a reinsurance policy issued by PNTI. Whether or not this potential interest materializes depends on the date of loss and would pertain only to that portion of a loss exceeding \$1,000,000.

federal law applicable to land title disputes involving Indian reservations. The Eighth Circuit concedes that had this conflict involved only private parties and the State of Iowa, state law would have been applied. The choice of federal law led the Court of Appeals to invoke 25 U.S.C. § 194, thereby shifting the burden of proof to the State of Iowa and the private claimants. The Eighth Circuit's reliance on 25 U.S.C. § 194 and its application of federal law reached a result contrary to state law.

Since land title matters have traditionally been governed by state law, federal common law on the subject is incomplete, unpredictable and at times in conflict with state law. For example, many states, including Iowa, presume that the movement of a river is by accretion and erosion unless the contrary is shown. *See, e.g., Kiteridge v. Ritter*, 172 Iowa 55, 151 N.W. 1097 (1915). The Court of Appeal had difficulty determining if there was any federal common law at all on this subject. Thus, the net effect of the Eighth Circuit's decision is to create instability in titles to lands where Indian reservations exist, particularly if a river or stream constitutes the reservation boundary. If the Eighth Circuit is not reversed, thousands of property owners throughout the country, as well as title insurers such as amici, will be left in a state of uncertainty as to the validity of such titles.

The concern of amici is heightened by the potential impact of 25 U.S.C. § 194 on Indian land title claims and disputes. Because these disputes often turn on events which took place many years ago, the burden of proof may well be the decisive factor in resolving questions of title. If the Court of Appeals decision stands, application of federal law and 25 U.S.C. § 194 will place the burden in every instance on the non-Indian party. The result will be the up-

setting of land titles on a scale that has never before occurred.

BRIEF OF AMICI CURIAE

OPINIONS BELOW

The memorandum opinion of the District Court, together with its findings of fact and conclusions of law, is reported at 433 F.Supp. 57, 67 (N.D. Iowa 1977) and the opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

STATUTE INVOLVED

25 U.S.C. § 194 provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in this case.
2. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.
3. Whether the Eighth Circuit erroneously construed 25 U.S.C. § 194 to apply to this case.
4. Whether the State of Iowa is "a white person", and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U.S.C. § 194.

Amici direct their comments to two of the issues as to which certiorari was granted:⁴

1. Did the Eighth Circuit err in holding that federal and not state common law is applicable in this case; and
2. Does federal law require divestiture of Iowa's title to real property located within its boundaries.

STATEMENT OF THE CASE

This case concerns the effect of movement of the Missouri River upon the common boundary of the parties. The Missouri River in the Blackbird Bend area is and has been a navigable stream since Iowa was admitted to the Union. Over the years the river has moved radically. At times it has altered its course by sudden (avulsive) changes. At other times, the river's slow and imperceptible meanderings have resulted in accretion to one shore and erosion of the other.

When Iowa was admitted to the Union on December 28, 1846 (5 Stat. 742), the westerly boundary of that state was designated as the center of the main channel of the Missouri River. Eight years later, on March 16, 1854, the Omaha Indian Tribe ceded all of its lands west of the Missouri River to the United States, reserving for their future home a portion of those lands located west of the center of the main channel of the Missouri River in the Territory of Nebraska. (Act of March 16, 1854, Art. 1, 10 Stat. 1043.) The common boundary between the Omaha Indian reservation and the State of Iowa at the time the reservation was created was therefore the center line of the main channel

4. The Court of Appeal's reliance upon federal law led it to invoke 25 U.S.C. § 194 to shift the burden of proof to the non-Indian parties. Amici concur with amicus curiae American Land Title Association that the Eighth Circuit's application of 25 U.S.C. § 194 was erroneous.

of the Missouri River.⁵ The easterly boundary of the Omaha Indian reservation was surveyed in 1867 by T. H. Barrett on behalf of the General Land Office of the United States. In that same year, on March 1, 1867, Nebraska was admitted to the Union and its easterly common boundary with Iowa was designated as the center of the main channel of the Missouri River. (14 Stat. 391.)

In succeeding years, it appears that the Missouri River first moved easterly and thereafter commenced a westward migration until it finally reached its present location. The river is now located substantially west of the 1867 Barrett survey line as well as west of its location as of the dates Iowa and Nebraska were admitted to the Union. Because of the frequent meanderings of the Missouri River and the difficulty in determining whether or not the changes in the river's course were avulsive or accretive, Iowa and Nebraska sought to eliminate continuing disputes over their boundary by entering into a compact in 1943. (Iowa-Nebraska Boundary Compact, Iowa Code 1971, pg. LXIV; 1943 Iowa Acts, ch. 306; 1943 Nebraska Laws, ch. 130. Ratified by Congress by Act of July 12, 1943, 57 Stat. 494.) The compact fixed the two states' common boundary at a location some distance east of the present location of the Missouri River but west of the 1867 Barrett survey line. Since one of the results of fixing the permanent boundary was that some riparian lands formerly located in one state were thereafter located in the other, the compact provided that titles good in the original state were to be recognized as valid. *Nebraska v. Iowa*, 406 U.S. 117, 120 (1972).

5. For the purpose of this brief only, amici have assumed, as did the Court of Appeal, that the eastern boundary of the reservation is the center of the main channel of the river. The private party petitioners dispute the Court of Appeal's assumption in this regard.

The controversy here centers on the movement of the Missouri River, which is the easterly boundary of the Omaha reservation, and whether such movement was the result of gradual and imperceptible accretion and erosion, as asserted by Iowa and the private party claimants, or of the sudden and perceptible process of avulsion, as claimed by the Omaha Tribe and the United States. The District Court refused to apply 25 U.S.C. § 194 and concluded that each side must bear the burden of persuasion as to the facts necessary to establish their claim. *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa 1977). The court thereupon determined that the movement of the Missouri had been due to accretion and erosion as contended by the State of Iowa and the private party claimants. 433 F.Supp. 67. The District Court concluded that although federal law fixed the initial boundary of the reservation, state law should be applied to determine the impact of the movement of the Missouri River upon that boundary. Applying state law, the District Court ruled that the boundary of the Omaha reservation had moved westward and that the private parties were entitled to ownership of the area in question since it had accreted to the Iowa side of the river.

The Eighth Circuit reversed, concluding that federal law should be applied not only to the original fixing of the boundary of the Omaha Indian reservation but also to all incidents of ownership that flowed therefrom, including the effect of the movement of the Missouri River. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978). It is the position of amici that the decision of the Eighth Circuit was erroneous and contrary to long-standing rules established by this Court.

SUMMARY OF ARGUMENT

Although federal law governs the construction of grants from the United States in the first instance, the incidents or rights which attach to ownership of such property are to be determined by state law. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378-380 (1977); *Packer v. Bird*, 137 U.S. 661, 669 (1891). The Court of Appeals refused to apply this rule for two reasons: first, the Court assumed that the dispute involved the location of the interstate boundary between Iowa and Nebraska and therefore required application of federal law, and second, the court concluded that a "special relationship" exists between the United States and the Omaha Indian Tribe which compels the application of federal law. Neither conclusion is correct.

The location of the Iowa-Nebraska boundary is not at issue here and has no bearing upon the claims of the parties. None of the parties' property boundaries depend upon the location of that line. Moreover, even if this dispute involved the location of the Iowa-Nebraska boundary, this Court has concluded that, although federal law would apply in resolving the location of the interstate boundary, state law would govern the rights attendant to land either emerging or disappearing on either side of that boundary by reason of movement of the stream which constitutes the boundary. *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

This Court has consistently held that the fact that an Indian reservation or Indian land is the subject of a land title dispute does not call for the application of federal rather than state law. State law governs the incidents of riparian ownership accruing to a federal reservation of Indian tribal lands, as well as federal grants of other lands. *Oklahoma v. Texas*, 258 U.S. 574 (1922).

The Court of Appeals erroneously concluded that recognition of the claims of the State of Iowa and the private owners would somehow "divest" the Omaha Tribe of a portion of its native lands. This error arose from the Court's lack of understanding of the nature of the riparian boundary which constitutes the common boundary between the Omaha Tribe and the other parties to the litigation.

The reservation boundary is the center of the main channel of the Missouri River. Since a riparian boundary is by nature a moving one, the Omaha tribe's ownership of riparian lands carries with it the risk that the acreage will be reduced through erosion. *See Nebraska v. Iowa*, 143 U.S. 359 (1892). Erosion of the boundary of the Omaha reservation does not constitute a divestiture of title; it is simply a consequence of ownership of riparian lands.

Application of federal rather than state law of avulsion and accretion, together with shifting the burden of proof to the non-Indian parties by the application of 25 U.S.C. § 194, results in replacing a reliable and well-understood body of state law with an incomplete and uncertain body of federal law. The Eighth Circuit's decision brings into question the grants of thousands of acres of riparian land adjoining Indian reservations without any legal or equitable rationale for doing so.

STATE LAW GOVERNS LAND TITLE QUESTIONS WHERE TITLE EMANATES ORIGINALLY FROM FEDERAL GRANTS

Application of state law to land title matters is based on the Tenth Amendment to the Constitution. The impact of the Tenth Amendment was discussed by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), where the Court held that except in matters governed by the United States Constitution or by acts of Congress, the law

to be applied in any case is the law of the state, since there is no federal general common law. 304 U.S. at 78. The *Eric* doctrine is applicable to actions brought by the United States or an Indian Tribe under 28 U.S.C. § 1362. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-592 (1973).

This Court has consistently held that although federal law governs the construction of an original grant from the United States, all incidents and rights attaching to such a grant will be determined by state law, as long as the state rule does not impair the efficacy of the federal grant. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378-380 (1977); *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894); *Hardin v. Jordan*, 140 U.S. 371 (1891); *St. Louis v. Rutz*, 138 U.S. 226 (1891); *Packer v. Bird*, 137 U.S. 661, 669 (1891). This rule was recently and emphatically affirmed in *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, where this Court reconsidered and reversed a contrary rule established in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

Application of state law of accretion here does not impair or destroy the efficacy of the federal reservation of Indian lands in any way. The eastern boundary of the Omaha reservation is described as being the center of a navigable stream. As pointed out by this Court in *Nebraska v. Iowa*, 143 U.S. 359 (1892), such a grant runs to a moving boundary which may change from time to time by accretion or erosion. Thus, movement of the Omaha Tribe's boundary because of the movement of the river does not cause a divestiture of title to land; it is simply one of the incidents of a riparian boundary.

The application of state law to determine the incidents of a federal grant is particularly appropriate where water

boundaries are involved, since the states acquired title to the beds of all navigable waterways by virtue of their sovereignty when they were admitted to the Union. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 374; *Shively v. Bowlby*, *supra*, 152 U.S. at 57-58; *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223-224 (1844). This Court has consistently held that it is within the sole province of each state to determine the rules of property applicable to lands adjacent to navigable waters. *Barney v. Keokuk*, 94 U.S. 324, 338 (1876); *Hardin v. Jordan*, *supra*; *Packer v. Bird*, *supra*.

In its decision below, the Eighth Circuit appears to have overlooked the fact that the State of Iowa obtained title to the bed of the Missouri River by reason of its sovereignty eight years prior to the creation of the Omaha reservation. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 373-375; *Pollard's Lessee v. Hagan*, *supra*, 44 U.S. (3 How.) at 223-224. Therefore, at the time the Omaha reservation was created, Iowa owned that portion of the Missouri River east of the center line of the main stream in its sovereign capacity. The effect of the Eighth Circuit's decision to apply federal law has been to deprive the State of Iowa of its vested rights to sovereign lands acquired prior to the creation of the Omaha reservation. There is no legal or policy justification for such a result.

Since state rather than federal law has traditionally been applied, no well-developed body of federal common law pertaining to land title matters exists. The federal law which does exist is incomplete and applicable only to special situations, such as an action between two states where original jurisdiction is vested in the United States Supreme Court. Therefore, the result of the Eighth Circuit's decision

is to supplant a well-developed and understood body of state law in favor of a nebulous and uncertain body of federal law. It goes without saying that such a result must be predicated upon some overriding rule or policy. As will be discussed *infra*, neither the applicable law nor its underlying rationale support the decision of the Court of Appeals.

**THIS CASE DOES NOT INVOLVE THE LOCATION OF
AN INTERSTATE BOUNDARY**

The Eighth Circuit concluded that federal law should be applied because the dispute purportedly involved the location of the interstate boundary between Iowa and Nebraska. This proposition is clearly incorrect.

The Eighth Circuit rather obliquely recognized the well-established principle that federal law governs the construction of grants from the United States in the first instance, but the incidents or rights which attach to ownership of such property are to be determined thereafter by state law. 575 F.2d at 628. See *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 378-380; *Shively v. Bowlby*, *supra*, 152 U.S. at 57-58; *Hardin v. Jordan*, *supra*; *St. Louis v. Rutz*, *supra*; *Packer v. Bird*, *supra*, 137 U.S. at 669. However, the Court relied upon a limited exception to that general proposition which calls for the application of federal law to disputes involving the location of an interstate boundary. 575 F.2d at 628.

Amici recognize that if a navigable stream constitutes an interstate boundary, federal common law determines the effect of a change in the bed of the stream on that boundary. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 375; *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Nebraska v. Iowa*, 143 U.S. 359 (1892).

However, the location of the common boundary between Iowa and Nebraska is not involved in the determination of the boundary of the Omaha reservation. The Iowa-Nebraska boundary was fixed by compact in 1943. The location of the boundary of the Omaha reservation is totally independent of the location of the interstate boundary, since it is defined by the center line of the main channel of the Missouri River, not by the Iowa-Nebraska boundary itself. The contrary might be true if the east boundary of the Omaha Indian reservation were described as being the west boundary of Iowa. However, such is not the case.

The interstate border only determines whether Iowa or Nebraska law applies in interpreting the incidents of ownership that arose from the establishment of the reservation. Its location is not at issue, so the interstate boundary exception to the general rule requiring application of state law is not applicable.

Even assuming *arguendo* that this suit does involve an interstate boundary dispute, that fact would still provide no basis for applying federal law. *Arkansas v. Tennessee*, 246 U.S. 158 (1918), involved a dispute between those two states arising out of the movement of the Mississippi River. This Court held that although it had original jurisdiction to resolve such an interstate boundary dispute, the law that is applicable to the rights attendant to land either emerging or disappearing on either side of the interstate boundary by reason of movement of the river is a matter to be determined according to the law of each state. The Court emphasized that it is for the states to establish for themselves such rules of property as they deem expedient with respect to navigable waters within their boundaries and the riparian lands adjacent to them. *Id.* at 175-176.

THE OMAHA TRIBE HAS NOT BEEN DIVESTED OF ITS LANDS

The Eighth Circuit accepted the contention of the United States and the Omaha Tribe that to recognize the claims of the State of Iowa and the private owners was to somehow divest the Omaha Tribe of a portion of its native lands. It appears that the Eighth Circuit refused to apply state law simply to avoid this result. However, the Eighth Circuit's rationale is based upon the faulty premise that application of state law would "divest" the Omaha Tribe of its reservation lands. This error arises from a lack of understanding of the nature of riparian boundaries.

A riparian boundary is by its very nature a moving boundary. *Nebraska v. Iowa*, 143 U.S. 359 (1892). Where a boundary is described with reference to the bank or center of a navigable stream, it must necessarily change when erosion or accretion occurs in order for the riparian character of the land to be maintained.

Recognizing that retaining the riparian character of land bordering navigable water is an essential element of the value of that land, the common law has always held that such a boundary moves with erosion or accretion. *Hughes v. Washington*, 389 U.S. 290, 293-294 (1967); *Nebraska v. Iowa*, 143 U.S. 359 (1892). Any other rule would deprive the riparian owner of what has often been recognized as the essential attribute and most valuable feature of riparian land—access to water. *Hughes v. Washington, supra*. For example, if in this case the Missouri River had moved east rather than west from the line of the Barrett survey and the law provided that riparian boundaries were not subject to change, the Omaha Tribe would be deprived of riparian rights and access to the Missouri River. The reverse is also true. With the westward migration of the Missouri River,

landowners to the east whose boundary extended to the middle of the stream would lose the riparian quality of their land if that boundary were fixed at the Barrett survey line.

To avoid consequences such as this, the law has recognized that riparian boundaries are subject to change due to erosion or accretion. Riparian owners may either gain or lose acreage depending upon the nature of the shift in the stream. In either event, however, their property line extends to the stream, thus preserving very valuable riparian rights. Contrary to the Eighth Circuit's conclusion, the Omaha Tribe was not "divested" of title under the decision of the District Court. Rather, the loss of acreage was an inherent risk of being a riparian owner.

If the United States and Omaha Tribe had wished to guarantee that in no event would the acreage of the reservation be decreased by the movements of the river, it would have been a simple matter to establish a reservation with fixed boundaries. When the reservation was established in 1854, it was common knowledge that rivers in general, and the Missouri River in particular, were prone to migrate through accretion and erosion. The United States and the Omaha Tribe must have recognized that it was more important to provide the Tribe with access to the Missouri River than to guarantee a fixed acreage. Accordingly, the eastern boundary of the reservation was defined as the center of the main channel of the Missouri River. Likewise, upon admission to the Union in 1846, the western boundary of the State of Iowa was described with reference to the center of the main channel of the Missouri River in order to afford landowners within the State access to the Missouri River.

Since a riparian boundary which calls to the center of the channel of a navigable stream is by nature a moving

boundary, movement of that boundary by erosion which diminishes the total acreage of a landowners' property does not "divest" the landowner of ownership. The State of Iowa and private owners were not "divested" of their ownership by the eastward migration of the Missouri River from 1890 to 1912, and the Omaha Tribe has not been "divested" of its ownership by the later westward migration of the river. All parties whose property was bounded by the center of the main channel of the Missouri River acquired their property subject to the possibility that their riparian boundary may move in one direction or the other. That possibility was and is an essential element of the nature of the grant by which they acquired title.

The decision of the Court of Appeals to apply federal law here (together with its use of 25 U.S.C. § 194) in effect gives to the Omaha Tribe the benefit of any accretions to the reservation by the eastward movement of the Missouri at the expense of the State of Iowa and the private owners, but exempts the Tribe from the risk of erosion due to a westward movement of the river. There is no law or policy that justifies such an inequitable result.

**THE FEDERAL GOVERNMENT'S "SPECIAL RELATIONSHIP"
WITH THE INDIAN TRIBE DOES NOT REQUIRE THE
APPLICATION OF FEDERAL COMMON LAW**

In its recent decision in *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, this Court held that the incidents of property ownership under a federal grant are governed by state law, even though construction of the initial grant is governed by federal law. 429 U.S. at 378-380. Absent a compelling federal interest, there is no reason to disturb the *Corvallis* rule.

This Court has already held that state law governs the incidents of riparian ownership accruing to a federal grant

of Indian tribal lands. *Oklahoma v. Texas*, 258 U.S. 574 (1922), involved competing claims to the bed of the Red River, which runs along a portion of Oklahoma-Texas border. The Court made the following statement:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*" 258 U.S. at 594-595 (emphasis added) (footnotes omitted).

Again, in *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), this Court observed:

"It is well settled that conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the state where the land lies." 318 U.S. at 209-210.

To the same effect are *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88-89 (1922) (state law of riparian rights applies to grants of Indian tribal lands), and *Francis v. Francis*, 203 U.S. 233, 241-242 (1906) (state rule of property used in determining whether Indians held land reserved under treaty in fee simple). Amici respectfully

submit that the foregoing decisions are dispositive of the choice of law questions considered below.

The decisions of the Courts of Appeal prior to the Eighth Circuit's decision below were in uniform agreement with the foregoing decisions of this Court. *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 147 (8th Cir. 1970) *aff'd* 298 F.Supp. 855 (D. Neb. 1969); *Choctaw and Chickasaw Nations v. Cox*, 251 F.2d 733, 735 (10th Cir. 1958); *Choctaw and Chickasaw Nations v. Seay*, 235 F.2d 30, 35 (10th Cir.), *cert. denied*, 352 U.S. 917 (1956); *Herron v. Choctaw and Chickasaw Nations*, 228 F.2d 830, 832 (10th Cir. 1956); *United States v. Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir. 1946), *aff'd sub nom. Oklahoma v. United States*, 331 U.S. 788 (1947).

In its decision below, the Eighth Circuit attempted to distinguish the prior decisions of this Court and of the Courts of Appeal on the grounds that those decisions involved conveyances of public land or patent grants of Indian allotment lands and not the boundaries of a tribal reservation as such. 575 F.2d at 629. The decisions of this Court indicate, however, that no such distinction is warranted. Titles to reservation lands, allotment lands and lands acquired by federal grant all derive from one paramount source: the federal government. Reservation lands are treated the same as any other federally patented lands. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941) ("[I]ndividual Indian occupancy . . . [is] not to be treated differently from 'the original nomadic tribal occupancy.'"); *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*, 260 U.S. at 87-88 (involving riparian rights of reservation lands of Osage Tribe).

The decisions cited by the Eighth Circuit do not support its decision. *Confederated Salish and Kootenai*

Tribes v. Namen, 380 F.Supp. 452 (D. Mont. 1974), *aff'd* 534 F.2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929 (1976), involved the riparian rights of the named tribes to the bed and banks of Flathead Lake which was immediately adjacent to their reservation. Since the United States held the bed and banks of Flathead Lake in trust for the Indians, there was no basis for applying state law, so the choice of law question simply did not arise. 380 F.Supp. at 461.

The Eighth Circuit also relied on this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). That case simply held that the District Court had federal question jurisdiction over a suit by the Oneida Nation for possession of reserved tribal lands because "the complaint asserted a current right to possession conferred by federal law, wholly independent of state law." 414 U.S. at 666. The Oneidas' claim thus involved their right to possession of reservation land in the first instance; it did not involve the incidents of ownership accruing after their right of possession was initially established. This Court recognized that "[o]nce [a] patent issues, the incidents of ownership are, for the most part, matters of local property laws to be vindicated in local courts. . . ." 414 U.S. at 676-677. Unlike the Oneidas, the Omahas' claim involves rights attributable to their ownership of the reservation, not the question of possession in the first instance.

The Eighth Circuit relied on "the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated" in deciding to apply federal law. 575 F.2d at 629. However, there is nothing in the nature of that "special relationship" that supports the application of federal law in this case.

The "special relationship" between the United States and the native Indian tribes was originally conceived to be one

of a guardian to its wards. *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Candelaria*, 271 U.S. 432, 439 (1926). The "guardian-ward" status, although sometimes cited by the courts, is a nineteenth century anachronism. The federal government has singled the Indians out for special treatment on numerous occasions, but the reasons for such special treatment have changed.

In the early days of the country's history, the Indians' special status was considered to preclude the application of any state law within the boundaries of an Indian reservation. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832). However, "[o]ver the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . ." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 171 (1973) (quoting *Williams v. Lee*, 358 U.S. 217 (1959)). The modern view adopted by this Court is that special treatment of Indians will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians. . . ." *Morton v. Mancari*, *supra*, 417 U.S. at 555.

The application of federal law to the exclusion of state law is one form of special treatment. It is above all justified to prevent discrimination against Indians. See *United States v. Oklahoma Gas & Electric Co.*, *supra*, 318 U.S. at 211. It is also appropriate to prevent state interference with tribal self-government or internal tribal relations. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Federal law also protects the Indians' right to possession of federally reserved lands and prevents their unlawful cession to or seizure by state governments. See *Oneida Indian Nation v. County of Oneida*, *supra*, 414 U.S. at 677.

None of these reasons calling for the application of federal law are involved in this case. There is no question of interference with tribal self-government or internal tribal relations. It is also undisputed that the Omaha Tribe owns the federally granted reservation lands bounded on the east by the Missouri River. Finally, and perhaps most importantly, there is no question of unequal or discriminatory treatment. The Omaha Tribe will receive the same treatment as all other riparian landowners in the State of Iowa. As this Court observed in *United States v. Oklahoma Gas & Electric Co.*, *supra*:

"The interpretation suggested by the Government [that federal law applies] is not shown to be necessary to the fulfillment of the policy of Congress to protect a less favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State. . . ." 318 U.S. at 211 (emphasis added).

There is therefore no rational basis for the special application of federal law. To the extent that the Eighth Circuit's decision below was based on any "special federal interest" in the Omaha Tribe, it is clearly erroneous.

CONCLUSION

It has long been accepted that state law applies to land title matters including the incidents of riparian ownership deriving from federal grants. Millions of acres of land have been bought and sold on this basis. This Court has often stated that where rules of property are at stake, stability and consistency require that they be changed only in rare situations. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 381.

The Eighth Circuit has now chosen to carve out an exception to this well-established legal principle underlying the system of land titles in this country. The effect of requiring application of federal law to claims involving Indian reservations is to superimpose a second body of incomplete and often inconsistent laws over a well-established and well-understood system. No justification exists for a rule which would apply federal law to the interpretation of the riparian boundary of an Indian reservation where an identical grant of adjoining property conveyed to a private party would be construed in accordance with state law. This is not one of those rare situations in which extraordinary circumstances require that a rule of property which has been extensively relied upon should be changed. The Eighth Circuit's decision below is erroneous and should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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WILLIAM J. CLARK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-160, 78-161

ROY TIBBALS WILSON, ET AL.,
v. *Petitioners*

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA

STATE OF IOWA, ET AL.,
v. *Petitioners*

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA

**On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit**

**BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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On Writ of Certiorari to the United States Court of Appeals
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BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

OPINIONS BELOW

The memorandum opinion of the District Court, together with its findings of fact and conclusions of law, is reported at 433 F. Supp. 57, 67 (N.D. Iowa 1977) and the opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

STATUTE INVOLVED

25 U.S.C. § 194 provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTION PRESENTED

Whether 25 U.S.C. § 194, which places the burden of proof upon a "white person" in litigation over property rights when "an Indian" is a party on one side and a "white person" is on the other, applies when the United States as trustee and an Indian tribe are on one side and various landowners, including natural persons of undetermined race, corporate entities and a state, are on the other.¹

¹ In supporting the petitions for a writ of certiorari herein, the American Land Title Association also urged review of the judgment and opinion of the Court of Appeals for the Eighth Circuit because Section 194 is unconstitutional on its face by its assignment of the burden of proof upon a racial basis in violation of the Fifth Amendment. In granting review, this Court restricted its consideration of the questions presented by the petitioners in this respect to the proper construction of Section 194 and therefore this brief is limited to that issue.

INTEREST OF THE AMICUS CURIAE²

The American Land Title Association (ALTA) is the national trade association of the land title industry. Its approximately 2,200 members include land title insurers, their agents, abstracters and associate members. The principal function of the land title industry is to facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions.

There is presently pending in numerous federal courts extensive Indian claims litigation for the recovery of land and for trespass or other damages for the wrongful possession of land.³ These cases seek the return of vast

² Attorneys for all of the parties herein have given written consent to the filing of this amicus brief. Copies of the consents have been submitted to the Court with this brief.

³ A partial list of cases includes: *United States v. Atlantic Richfield*, No. A-75-215 Civ. (D. Alaska), *appeal docketed*, No. 77-3972, 9th Cir., Sept. 6, 1977; *United States v. Maine*, Civ. No. 1966-ND, 1969-ND (D. Me.); *Western Pequot Tribe v. Holdridge Enterprises, Inc.*, Civ. No. H-76-193 (D. Conn.); *Schaghticoke Tribe v. Kent School Corporation*, Civ. Action No. H-75-125 (D. Conn.); *Mashpee Tribe v. New Seabury Corp.*, Civ. No. 76-3190 (D. Mass.), *appeal docketed*, Nos. 78-1272-73-74, 1st Cir., May 1, 3 and 9, 1978; *Chitimacha Tribe v. Harry L. Laws Co.*, Civ. No. 770772-L (W.D. La.); *Oneida Indian Nation v. County of Oneida*, 70-CV-35 (N.D.N.Y.); *Oneida Indian Nation v. New York State Thruway Authority*, 78-CV-104 (N.D.N.Y.); *Seminole Tribe v. Florida*, No. 78-6116-CIV (S.D. Fla.). In addition to these and numerous other pending cases, the United States, through the Department of the Interior, has indicated its intention to recommend the institution of a number of additional actions on behalf of Indian tribes. For example, on July 1, 1977 the Department announced its recommendation that the Justice Department on behalf of St. Regis, Mohawk, Cayuag and Oneida Nation Tribes sue those persons claiming an adverse interest in approximately 272,500 acres of land in upper New York State. Department of Interior News Release dated July 1, 1977. On August 30, 1977 the Department similarly recommended litigation on behalf of the Catawba Indian Tribe for approximately 140,000 acres of land in the Rock Hill, South Carolina area. *Washington Post*, August 31, 1977, at p. A6. In fact, in connection with legislation to

amounts of real property from present owners and the recovery of billions of dollars in damages upon the basis that past acquisitions of Indian tribal land by the defendants or their predecessors in interest were invalid and of no effect.⁴ This litigation has been instituted in virtually every instance by either the United States, as trustee for an Indian tribe, or by an Indian tribe itself, or both.

The statute at issue herein, 25 U.S.C. § 194, purporting to govern the allocation of the burden of proof in Indian claims litigation "about the right of property," has never been applied in any reported case prior to the opinion of the Court of Appeals for the Eighth Circuit herein since the time of its original enactment some one hundred and fifty-six years ago.⁵ The belated resuscitation of this statute is of great concern to the ALTA and to all persons relying upon the marketability of land titles.

Inasmuch as the events complained of in Indian land claims litigation occurred in the distant past, in many cases almost two hundred years ago, the outcome of the

extend the statute of limitations provided in 28 U.S.C. § 2415 for commencing Indian claims for monetary damages by the United States, as trustee, the Department indicated that the number of potential claims under review "could amount to well over 1,000." S. Rep. No. 95-236, 95th Cong., 1st Sess. 2 (1977).

⁴ Among the more substantial of the claims for land and damages at issue in the pending cases are *United States v. Maine*, *supra*, approximately 12.5 million acres and an estimated \$25 billion in trespass damages; *Chitimacha Tribe v. Harry L. Laws Co.*, *supra*, 7,000 acres of land and \$100,000,000 in damages; *Oneida Indian Nation v. New York State Thruway Authority*, *supra*, approximately 6 million acres and damages exceeding \$12 million.

⁵ The opinion itself notes that two previous cases have cited Section 194 but that "... neither case expounds upon the effect the section should be given." 575 F.2d at 631 n.19. *United States v. Sands*, 94 F.2d 156 (10th Cir. 1938); *Felix v. Patrick*, 36 F. 457 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892).

litigation may often rest upon the burden of proof, as it clearly did herein.⁶ The Eighth Circuit's sweeping application of Section 194 would suddenly erase in this and other similar cases accepted allocations of the burden of proof which have been developed over the years in courts throughout the country in actions affecting title to real property. This development of the law has contributed substantially to stable and predictable land transfers which are a necessary prerequisite to the informed judgment of attorneys, abstracters, title insurers, government agencies and others who must pass daily upon the state of title to real property.

INTRODUCTION AND SUMMARY OF ARGUMENT

25 U.S.C. § 194 purports to place the burden of proof upon the "white person" in all trials about the right of property in which "an Indian may be a party on one side" and "a white person on the other," once the Indian establishes a "presumption of title in himself from the fact of previous possession or ownership." The predecessor of Section 194 was first enacted into law in 1822 in the Indian Trade and Intercourse Act of that date and enacted in its present form in the 1834 Indian Trade and Intercourse Act.⁷

⁶ Of course, the application of the burden of proof is frequently critical in any case, as this Court has observed:

Where the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive to the outcome of the litigation

Lavine v. Milne, 424 U.S. 577, 585 (1976).

⁷ As noted by the Eighth Circuit, 25 U.S.C. § 194 is derived intact from Section 22 of the 1834 Indian Trade and Intercourse Act, Act of June 30, 1834, 4 Stat. 729, 733. 575 F.2d at 632 n.20. A complete copy of the 1834 Indian Trade and Intercourse Act is included herein as an Appendix.

In holding that the defendants herein "failed in sustaining their burden of proof under § 194," the Eighth Circuit Court of Appeals applied this statute in two consolidated cases in which an Indian tribe and the United States, as trustee for the tribe, were "on one side" and several natural persons of undetermined race, two corporations and a state were "on the other." Thus, the Eighth Circuit, without articulating any reason for doing so, construed the term "an Indian" as including an Indian tribe and the United States, as trustee for the tribe; and it construed the term "white person" as including, in effect, any person or entity that is not an Indian.

In urging the validity of this construction, the United States and the Omaha Indian Tribe both place primary reliance upon the notion that "... statutes enacted for the protection of Indians should be 'liberally construed, doubtful expressions being resolved in favor of the Indians.'" Brief of the United States in Opposition to the Petitions for Certiorari at 10; Brief of the Omaha Indian Tribe in Opposition at 20-22. Regardless of whether such a "liberal construction" rule might apply in other contexts,* as this Court has recently noted, it does not apply "in the face of congressionally manifested intent to the contrary" *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). In the instant case, a review of the language of Section 194, the other provisions of the Act of which it was a part and the surrounding circumstances at the time of its adoption, all

* In fact, it has been suggested that the application of the doctrine of liberal construction applicable to bilaterally arranged Indian treaties and agreements should not control the construction applied to unilaterally enacted statutes. Decker, *The Construction of Indian Treaties, Agreements and Statutes*, 5 AM. IND. L. REV. 299 (1977); see also, *United States v. First National Bank*, 234 U.S. 245 (1914).

establish that the Eighth Circuit's sweeping extension of the statute was improper and unwarranted.

Moreover, there is no present need to broadly interpret the scope of Section 194 beyond its terms. At the time of its initial adoption in 1822, Section 194 was an apparent response to the individual Indian's inability to make effective use of the judicial system to protect his right to property. See p. 18 *infra*. However, as the instant case demonstrates, tribal claims to land are undertaken by the federal government or by the tribe itself or by both, with significant resources and competent legal talent.*

* In fact, it cannot be seriously argued that the litigation obstacles that Section 194 was designed to remedy at the time of its enactment still exist today for the individual Indian. Subsequent legislation has been directed toward the assurance of equal opportunity in litigation, premised upon a universal basis and not limited to any particular group. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1970), was a watershed in protecting the rights of all of those engaged in the litigation process. The Civil Rights Act goes beyond Section 194 in its extension of these rights not just to racial or ethnic minorities but to "all persons." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976).

ARGUMENT

I. Section 194 Does Not Apply To Indian Land Claims In Which The United States Or An Indian Tribe Are A Party Or Parties On One Side.

A. By Its Terms, Section 194 Only Applies When "An Indian" Is A Party.

As this Court has recently observed, "[l]ogic and precedent dictate that the starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 98 S. Ct. 2370, 2375 (1978). Section 194 applies only when "an Indian may be a party on one side." It further requires that the burden of proof shall rest upon the "white person" once "the Indian shall make out a presumption of title in himself." All of these terms obviously refer to an Indian as an individual. However, the only party plaintiffs in these consolidated cases are the United States, as trustee, and the Omaha Tribe, each asserting a tribal interest in the property at issue.¹⁰

Traditionally, significant differences have existed between the rights, privileges and interests of an individual Indian on the one hand and an Indian tribe on the other. Both prior to 1834 and thereafter, individual Indians held property separate from any tribal property. See, e.g., *Godfrey v. Beardsley*, 10 F. Cas. 520 (D. Ind. 1841) (No. 5,497); FELIX S. COHEN, *FEDERAL INDIAN LAW*

¹⁰ The District Court found that the United States "derives its interest in this litigation as a Trustee for the Omaha Indian Tribe and their reservation lands reserved to the Tribe pursuant to the Treaty of 1854." 433 F. Supp. at 68.

With respect to the nature of the tribal plaintiff, the District Court found the Omaha Indian Tribe to be "a duly organized body corporate, established pursuant to its Constitution and Bylaws having been approved by the Secretary of the Interior as provided by law." *Id.*

206-7 (1942); Gilbert and Taylor, *Indian Land Questions*, 8 ARIZ. L. REV. 102, 111-112 (1966). Further, a tribe's authority to sue extends only to claims involving tribal interests and not to the legal or equitable claims of individual members of the tribe. See, e.g., *Sioux Tribe v. United States*, 89 Ct. Cl. 31 (1939). Conversely, individual Indians do not have the same interest in tribal land as the tribe and, thus, cannot assert a tribal claim. See, e.g., *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906 (Ct. Cl. 1963).

The Eighth Circuit construed Section 194 as if it provided that in "trials about the right of property in which an Indian or an Indian tribe or the United States may be a party on one side . . . the burden of proof shall rest upon the white person, whenever the Indian or an Indian tribe or the United States shall make out a presumption of title in himself or itself from the fact of previous possession or ownership." Such an expansive interpretation goes far beyond the words actually chosen by Congress because neither the United States, as trustee, nor the Omaha Indian Tribe is "an Indian," nor are they litigating about the individually held property rights of an Indian. Inasmuch as the statutory "language itself" is plain and unambiguous, it is clear that it is the duty of the courts to enforce the law as written. *United States v. First National Bank*, 234 U.S. 245 (1914); *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

In *First National Bank*, *supra*, this Court was called upon to construe the provisions of a statute which removed restrictions on alienation of real property as respects "mixed blood" Indians, but placed the decision concerning such removal as to "full bloods" in the discretion of the Secretary of the Interior. In rejecting the argument of the United States that the statutory

term "mixed blood Indians" meant Indians of more than half white blood, this Court determined that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant" 234 U.S. at 258. The Court reached this result despite the government's urging that to do so would be inconsistent with the underlying purpose of the Act:

If Congress, having competency in mind and that alone, had intended to emancipate from the prevailing restriction on alienation only those who were half white or more, by a few simple words it could have effected that purpose. *We cannot believe that such was the congressional intent, and we are clearly of opinion that the courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people.*

234 U.S. at 262 (emphasis supplied).

The result should be no different herein. If Congress had intended to extend the provisions of Section 194 more broadly to include an Indian tribe or the United States, it could have done so easily by the addition of a "few simple words." Since Congress chose not to include Indian tribes or the United States in Section 194, clearly "the courts may not supply the words which Congress omitted." 234 U.S. at 262. In other sections of the same Indian Trade and Intercourse Act, Congress did, in fact, expressly extend the Act to include Indian tribes as well as individual Indians. See pp. 13-14 *infra*.

B. An Analysis Of The Trade And Intercourse Act Of 1834 And The Surrounding Circumstances Indicates That The Singular Term "Indian" Refers To Individual Indians And Not To An Indian Tribe Or To The United States, As Trustee For The Tribe.

As originally enacted in 1822, the burden of proof section of the Trade and Intercourse Act applied in actions about a right of property in which "Indians" were a party on one side and a white person was on the other.¹¹ In 1834 Congress changed the application of this statute from trials in which "Indians" were on one side to trials in which "an Indian" was on one side. It is not entirely clear whether the 1822 reference to "Indians" was intended to include tribes, but the 1834 Act made it clear that Congress intended to limit the scope of this section to those cases involving individual Indians litigating about their own rights of property. The United States argues that this change was only to make the "syntax" of Section 194 consistent, inasmuch as the 1822 provision had "shifted uncomfortably between plural and singular terms."¹² Brief of the United States in Opposition to the Petitions for Certiorari at 11. However, it is apparent that Congress in fact chose the more

¹¹ The 1822 version read in full:

And be it further enacted, that, in all trials about the right of property, in which Indians shall be a party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.

Act of May 6, 1822, § 4, 3 Stat. 682, 683.

¹² *And be it further enacted*, That, in all trials about the right of property, in which *Indians* shall be party on one side and *white persons* on the other, the burden of proof shall rest upon *the white person*, in every case in which *the Indian* shall make a presumption of title in *himself* from the fact of previous possession and ownership.

Brief of the United States in Opposition to the Petitions for Certiorari at 11.

restrictive singular modification in order to eliminate whatever ambiguity may previously have existed. Were syntax the only concern of Congress in 1834 and if it intended the scope of this statute to extend more broadly, the obvious change would have been to have changed "himself" to "themselves" and to have made the statute expressly applicable to "Indian tribes."

Moreover, a review of the various provisions of the 1834 Trade and Intercourse Act indicates that each reference to "an Indian" or "Indian" refers to an Indian individually and not to an Indian tribe or to the United States as trustee for the tribe. When construing a particular word or phrase in one section of a statute, it is important to examine the meaning and use of the same word or phrase in other sections of the statute. *See, e.g., United States v. Cooper Corp.*, 312 U.S. 600 (1941); *United States v. Vargas*, 380 F. Supp. 1162, 1166 (E.D.N.Y. 1974); *see also, United States v. Nunez*, 573 F.2d 769 (2d Cir.), *cert. denied*, 98 S. Ct. 2828 (1978).

Thus, for example, Sections 4, 7 and 8 contain restrictions upon "any person other than an Indian" with respect to living or trading in Indian country. The term "an Indian" clearly refers to an individual since the reference is to "any person."

Section 16 relates to the commission of any crime by a white person which injured or destroyed the property of "any friendly Indian." The section provided that the offender shall be required to pay twice the value of the property to "such friendly Indian" and if the offender could not pay, the sum would be paid by the United States. It was then provided:

That no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property, if he or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence

Thus, this Section clearly uses "Indian" to describe an individual.

Section 20 refers to the sale of spiritous liquor to "an Indian" and applies to "any white person or Indian" about to introduce liquor into Indian country and authorizes the "places of deposits of such *person* to be searched" Once again this use shows that the term "Indian" means persons and not tribes.

Finally, Section 25 provides that the criminal laws shall be in force in Indian country with the provision that the laws do not apply "to crimes committed by one Indian against the person or property of another Indian." The references here are clearly to individual Indians. The phrase "crime by one Indian" certainly does not refer to crimes by tribes. Further, the second reference is to crimes against the "person" of another Indian.¹³

Examination of the provisions of various sections of the 1834 Indian Trade and Intercourse Act also demonstrates that Congress did not consider the phrase "an Indian" interchangeable with the phrase "Indian tribe." While certain sections such as Section 22 (the predecessor of Section 194) applied to "an Indian" only, other sections applied more broadly to an "Indian nation" or

¹³ *Cf. United States v. Rogers*, 27 F. Cas. 886 (D. Ark. 1845) (No. 16,187); *United States v. Sanders*, 27 F. Cas. 950 (D. Ark. 1847) (No. 16,220). In holding that the exception in Section 25 for crimes committed "by one Indian" against another did not apply to a white man adopted by an Indian tribe, the court in *Rogers*, *supra*, emphasized the racial meaning of the term rather than its significance in a tribal context:

. . . [the] exception is confined to those who, by the usages and customs of the Indians, are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.

27 F. Cas. at 889.

"Indian tribe". In fact, when the protection provided by certain sections of the 1834 Trade and Intercourse Act was designed to apply *both* to individual Indians and to Indian tribes, Congress so provided.

Thus, Section 9 prohibits the ranging or feeding of cattle and horses "on any land belonging to any Indian or Indian tribe." This Section clearly contemplated a distinction between "an Indian" and an "Indian tribe."

Sections 13, 14 and 15 relate to correspondence or messages with Indians with intent to cause violations of treaties and laws of the United States. In each of these sections there is a reference to correspondence with "any Indian nation, tribe, chief or individual," again evidencing a Congressional recognition of the distinction between tribes of Indians and individual Indians.

Section 17 concerns the taking or destruction of property of persons lawfully in Indian country by Indians. The Section applies to "any Indian or Indians, belonging to any tribe in amity with the United States." This Section also provides for payment to the injured party upon "application to the nation or tribe to which said Indian or Indians" shall belong. Thus, there is a clear distinction between "Indian" and a tribe.

The Congressional decision to limit the scope of Section 194 may be best understood by comparing that section with the section dealing with tribal interests in property as well as by considering the different respective capacities of individual Indians and Indian tribes to litigate at that time. From 1796 until 1834 the Act prohibited a conveyance of lands from "any Indian, or nation, or tribe of Indians" unless the same be made with the consent of the United States. Act of May 19, 1796, § 12, 1 Stat. 469, 472; Act of March 30, 1802, § 12, 2 Stat. 139, 143. In 1834, this prohibition was amended to apply more narrowly to such a conveyance from "any Indian nation or tribe of Indians." Act of

June 30, 1834, § 12, 4 Stat. 729, 730. At the same time, Congress enacted the predecessor of Section 194 in its present form by limiting its application to those cases in which "an Indian" was a party on one side. *See pp. 11-12 supra*. Thus, in 1834 Congress appears to have conceived of Section 12 as protective of tribal property rights and Section 22 (Section 194) as protective of a "right of property" owned by an Indian individually.

Moreover, as a general rule in the nineteenth century, without specific legislative authority, tribes could not assert tribal claims in court and were immune from suit by others. *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 1677 (1978); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); FELIX S. COHEN, *FEDERAL INDIAN LAW* 283-85 (1942). On the other hand, individual Indians were able to litigate about their individual rights in property. *Felix v. Patrick*, 145 U.S. 317 (1892); COHEN, *supra* at 162-64. In restricting the application of the burden of proof statute to individual Indians, Congress may have had this distinction in mind as well.¹⁴

II. Section 194 Does Not Apply To Indian Land Claims In Which A Corporate Entity Or State Are A Party Or Parties.

A. By Its Terms, Section 194 Only Applies When "A White Person" Is A Party.

Section 194 requires for its application not only that "an Indian" be on one side but also that there be "a white person on the other." In the instant case, the defendants having various interests in the 2,900 disputed acres include several natural persons,¹⁵ two corporations, the State of Iowa and the State Conserva-

¹⁴ Our research discloses no specific legislative history concerning the meaning or purpose of Section 194.

¹⁵ No evidence was offered with respect to the racial characteristics of the natural person defendants.

tion Commission. In applying Section 194, the Eighth Circuit Court of Appeals concluded that "white person," as used in the statute, means all "non-Indians" of any kind, including corporate entities, a state and a state agency.¹⁶ This conclusion directly contradicts prior judicial interpretation of the term and the intention of Congress at the time Section 194 was enacted, as well as the clear language of the statute.

Although the term "person" as used in a statute has been interpreted in different ways over the years,¹⁷ the term "white person" as used in 1834 and subsequently has been consistently interpreted by this Court and others as including only those of the Caucasian race. This has been true with respect to the use of this term both in the 1834 Indian Trade and Intercourse Act itself and in other statutes. *United States v. Perryman*, 100 U.S. 235 (1879); *Ozawa v. United States*, 260 U.S. 178, 197 (1922) ("... the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race" (Naturalization Acts)); *In Re Ah Yup*, 1 F. Cas. 223 (D. Cal. 1878) (No. 104).

In *Perryman*, this Court interpreted the term "white person" in the Indian Trade and Intercourse Act of 1834 to denote explicitly a Caucasian and no others. The Court there indicated that this was the meaning that term had at the time of its original enactment, and that the term therefore could not be construed merely to

¹⁶ The Eighth Circuit simply found that "the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title..." 575 F.2d at 633 (emphasis added). The Court reached this conclusion without any discussion of the term "white person."

¹⁷ In 1822 when the predecessor of Section 194 was first enacted and for many years thereafter the term "person" was construed so as not to include a corporation for purposes of constitutional and statutory analysis. *Monell v. Department of Social Services*, 98 S. Ct. 2018, 2034 (1978).

mean "not an Indian." Section 16 of the 1834 Indian Trade and Intercourse Act provided that whenever a "white person" committed a crime within Indian country and was unable to pay the value of any Indian property taken, the United States was required to compensate the Indian. A Negro was convicted of stealing cattle from an Indian and the Indian instituted an action against the United States for the value of the stolen cattle. In finding the United States to have no liability pursuant to Section 16, this Court stated:

The term "white person," in the Revised Statutes, must be given the same meaning it had in the original act of 1834. Congress had nowhere manifested an intention of using it in a different sense.

100 U.S. at 236.

There is no reason to construe the term "white person" as found in Section 22 of the 1834 Trade and Intercourse Act to have a different meaning than the same term has in Section 16 of the same Act. When the same term is used in different sections of the same statute, it is generally presumed to mean the same thing, absent a clear demonstration of a contrary intent. See, e.g., *United States v. Gertz*, 249 F.2d 662, 665 (9th Cir. 1957); *Meyer v. United States*, 175 F.2d 45 (2d Cir. 1949); see also, *Marks v. United States*, 161 U.S. 297 (1896). Cf., *United States v. Montgomery Ward & Co.*, 150 F.2d 369 (7th Cir.), vacated as moot on other grounds, 326 U.S. 690 (1945) (It is a heavy burden to show that same word has a different meaning either in the same act or in several acts which are *in pari materia*).

The United States has acknowledged that "white person" as used in Section 16 was intended by Congress to have a "narrow use," but argues that a "narrow use" of the same term in Section 22 served no specific legisla-

tive purpose. Brief of the United States in Opposition to the Petitions for Certiorari at 12. However, the decision of Congress in 1834 to limit the protection afforded to an Indian by Section 194 to trials involving a "white person" on the other side presumably served a "specific legislative purpose," for there is evidence that the problems individual Indians then encountered in litigation would usually have arisen when a "white person" was "on the other side." See, e.g., J. APPLETON, RULES OF EVIDENCE 271-80 (1860). In ascertaining Congressional intent in the context of interpreting Indian legislation, the legislation ". . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

The government seems to be saying that Section 194 is an anachronism premised upon a suspect racial classification—"white person." In effect, the government contends that the scope of Section 194 should be judicially transformed to mean "non-Indians" of any kind so that this 1834 anachronism can be applied to the changed world of 1978 where land is held by human beings of all races and by corporations, partnerships, syndicates, trusts, states, and other entities. According to the government, such a transformation would be "far more consistent with Congress' protective policies." Brief of United States in Opposition to Petitions for Certiorari at 12-13. However, "[t]he responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." *First National Bank, supra*, 234 U.S. at 260.

B. An Analysis Of The Trade And Intercourse Act Of 1834 And The Surrounding Circumstances Indicates That The Term "White Person" Does Not Include All Non-Indian Persons And Entities.

An examination of other sections of the 1834 Trade and Intercourse Act indicates that when Congress determined to extend the scope of various provisions of the Act beyond a "white person" to include any person other than an Indian (all "non-Indians"), it did so in precisely that language. Section 4 provided that "any person other than an Indian" who attempted to reside in Indian country as a trader without license would suffer a penalty and forfeit goods. Sections 7 and 9 imposed a forfeiture of certain monies upon "any person other than an Indian" for trading a gun, trap or other article commonly used in hunting or hunting in Indian country. In the same fashion, Section 9 prohibited "any person" from driving cattle upon land "belonging to any Indian or Indian tribe."¹⁸

These provisions again indicate deliberate Congressional attention to the language utilized and rebut any argument that "white person" should be construed to mean "any person or entity other than an Indian." There is no basis to expand "white person" to mean all "non-Indians," including a state, corporate entities and persons of undetermined race.

¹⁸ Similarly, courts have construed the word "person" as used in the 1834 Trade and Intercourse Act as including individual Indians because of indications in other parts of the Act that when Congress intended differently, it so provided:

Other considerations make it probable that this word person was used in this section [20] with intent to include Indians. In other sections of the act (sections 7 and 8, 4 Stat. 729), the intention not to include Indians in the word person is manifested as follows: "If any person other than an Indian shall," etc.

United States v. Shaw-Mux, 27 F. Cas. 1049 (D. Ore. 1873) (No. 16,268).

III. Conclusion.

Section 194 is on its face an anachronism. The scope of this anachronism was erroneously extended by the Eighth Circuit in applying the statute in litigation in which the United States, as trustee, and an Indian tribe are parties on one side and various landowners, including corporations and a state are on the other. Neither the language of Section 194 itself, nor the 1834 Indian Trade and Intercourse Act of which it is a part, nor precedent supports such a result.

Respectfully submitted,

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APPENDIX

APPENDIX

INDIAN TRADE AND INTERCOURSE ACT OF 1834

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

SEC. 2. *And be it further enacted,* That no person shall be permitted to trade with any of the Indians (in the Indian country) without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be

the duty of the persons granting or revoking such licenses, forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.

SEC. 3. *And be it further enacted*, That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country, or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the superintendent, to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

SEC. 4. *And be it further enacted*, That any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.

SEC. 5. *And be it further enacted*, That no license to trade with the Indians shall be granted to any persons except citizens of the United States: *Provided*, That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.

SEC. 6. *And be it further enacted*, That if a foreigner shall go into the Indian country without a passport from

the War Department, the superintendent, agent, or sub-agent of Indian affairs, or from the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

SEC. 7. *And be it further enacted*, That if any person other than an Indian shall, within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.

SEC. 8. *And be it further enacted*, That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.

SEC. 9. *And be it further enacted*, That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

SEC. 10. *And be it further enacted*, That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian

country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

SEC. 11. *And be it further enacted*, That if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

SEC. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless*, That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

SEC. 13. *And be it further enacted*, That if any citizen or other person residing within the United States or the

territory thereof, shall send any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquility of the United States, he shall forfeit and pay the sum of two thousand dollars.

SEC. 14. *And be it further enacted*, That if any citizen, or other person, shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, knowing the contents thereof, he shall forfeit and pay the sum of one thousand dollars.

SEC. 15. *And be it further enacted*, That if any citizen or other person, residing or living among the Indians, or elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.

SEC. 16. *And be it further enacted*, That where, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least

equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment, out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also*, That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

SEC. 17. *And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the mean time, in respect to the property so taken, stolen or destroyed, the United States guaranty, to the party so injured, an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall, in any way, violate

any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That, unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.

SEC. 18. *And be it further enacted*, That the superintendents, agents, and sub-agents, within their respective districts, be, and are hereby, authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the two preceding sections of this act, and to administer an oath to the deponents.

SEC. 19. *And be it further enacted*, That it shall be the duty of the superintendents, agents, and sub-agents, to endeavour to procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of the United States to be employed in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes.

SEC. 20. *And be it further enacted*, That if any person shall sell, exchange, or give, barter, or dispose of, any spirituous liquor or wine to an Indian, (in the Indian

country,) such person shall forfeit and pay the sum of five hundred dollars; and if any person shall introduce, or attempt to introduce, any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any such spirituous liquor or wine is found, the goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.

SEC. 21. *And be it further enacted*, That if any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or contin-

ued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.

SEC. 22. *And be it further enacted*, That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

SEC. 23. *And be it further enacted*, That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and him immediately to convey from said Indian country, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court-martial shall direct.

SEC. 24. *And be it further enacted*, That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is

bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri; west, by the Mexican possessions; south, by Red river; and east, by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid, the several portions of Indian country east of the said Mississippi river, shall be, and are hereby, severally annexed to the territory in which they are situate.

SEC. 25. *And be it further enacted*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

SEC. 26. *And be it further enacted*, That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territories, such offenders may be there apprehended, and transported to the territory or judicial district having jurisdiction of the same.

SEC. 27. *And be it further enacted*, That all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (in any state or territory in which the defendant shall be arrested or found,) the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SEC. 28. *And be it further enacted*, That when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

SEC. 29. *And be it further enacted*, That the following acts and parts of acts shall be, and the same are hereby, repealed, namely: An act to make provision relative to rations for Indians, and to their visits to the seat of government, approved May thirteen, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine, eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen; an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other

purposes," approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Arkansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable to the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four; the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a sub-agent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however,* That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also,* That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

SEC. 30. *And be it further enacted,* That until a western territory shall be established, the two agents for the Western territory, as provided in the act for the organization of the Indian department, this day approved by the President, shall execute the duties of agents for such tribes as may be directed by the President of the United States. And it shall be competent for the President to assign to one of the said agents, in addition to his proper duties, the duties of superintendent for such district of

country or for such tribes as the President may think fit. And the powers of the superintendent at St. Louis, over such district or tribes as may be assigned to such acting superintendent, shall cease: *Provided,* That no additional compensation shall be allowed for such services.

APPROVED, June 30, 1834.

MOTION FILED

FEB 9 1978

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, *et al.*,

Petitioners,

v.

OMAHA INDIAN TRIBE, *et al.*,

Respondents.

No. 78-161

IOWA, *et al.*,

Petitioners,

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OMAHA INDIAN TRIBE, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE and BRIEF *AMICUS CURIAE*
OF NATIVE AMERICAN RIGHTS FUND and
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.
IN SUPPORT OF RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, *et al.*,
Petitioners,

v.

OMAHA INDIAN TRIBE, *et al.*,
Respondents.

No. 78-161

IOWA, *et al.*,
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v.

OMAHA INDIAN TRIBE, *et al.*,
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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF NATIVE AMERICAN RIGHTS FUND
AND ASSOCIATION ON AMERICAN INDIAN
AFFAIRS, INC. FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE*

Pursuant to Rule 42 of the Supreme Court Rules, the
Native American Rights Fund and the Association on
American Indian Affairs, Inc. move the Court for leave
to file the attached brief *amicus curiae* in support of

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respondents. Petitioners State of Iowa, State Conservation Commission of the State of Iowa, Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, and Harold Jackson have given written consent to the filing of this Brief. Petitioners Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson have refused to give their consent. Respondent United States has given its written consent; respondent Omaha Tribe of Indians has refused to give its consent.

The Native American Rights Fund is a nonprofit, tax exempt law firm with its principal office in Boulder, Colorado. It is funded by private foundations, charitable contributions, and government grants. Its attorneys are engaged exclusively in representing individual Indians and Indian tribes, most of whom are financially unable to retain private counsel.

The Association on American Indian Affairs, Inc., is a nonprofit, tax exempt, membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. Its principal office is in New York City. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 20,000 comprising both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts.

The Native American Rights Fund and the Association have submitted briefs *amicus curiae* in recent Indian cases that have come before this Court, including *United States v. John*, 437 U.S. ____ (1978); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *Morton v. Ruiz*, 415 U.S. 199 (1974).

This case presents an issue of great concern to the Association, the Native American Rights Fund and the Indian people of this country—whether Indian title disputes, particularly those that involve movements of navigable waters, will be resolved in a manner that effectuates or frustrates the purposes for which Indian reservations were established. If the petitioners prevail, longstanding federal Indian policies will be severely impaired. While both the United States and the Omaha Indian Tribe have naturally tended to focus their arguments on the rather technical aspects of the immediate dispute, the attached Brief *amicus curiae* focuses on the broader ramifications of this suit. The Native American Rights Fund and the Association submit the attached Brief to assist the Court in recognizing that a decision adverse to the United States and the Omaha Indian Tribe will seriously jeopardize the fulfillment of national Indian policies.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF
NATIVE AMERICAN RIGHTS FUND
AND ASSOCIATION ON
AMERICAN INDIAN AFFAIRS, INC.

INTEREST OF AMICI

The interest of the *amici* Native American Rights Fund and Association on American Indian Affairs, Inc., is set forth in the preceding Motion for Leave to File Brief as *Amici Curiae*.

STATEMENT OF THE CASE

The Omaha Indian Reservation established pursuant to the Treaty of March 16, 1854, 10 Stat. 1043, included 2,900 acres of land in an area known as Blackbird Bend. This land was originally located west of the Missouri River and was surveyed in 1867 by T. H. Barrett, but by 1923 the river had moved more than two miles to the west. As a result of that movement, the 2,900 acres in the original Blackbird Bend area is now located on the east side of the river. The petitioners claim that the original reservation lands washed away and that the 2,900 acres accreted to their Iowa riparian lands. The United States and the Omaha Tribe claim that they retain title to the disputed lands.

SUMMARY OF ARGUMENT

1. In *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), this Court held that state law governs the determination of title to lands affected by the movement of navigable waters in the absence of a federal interest that requires the displacement of state law. Since the nature and extent of Indian title is and always has been the exclusive province of federal law, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), it is federal law that must be applied in this case.

2. Indian lands that underlie, are adjacent to, or are in the vicinity of navigable and non-navigable bodies of water are often critically important in fulfilling the purposes for which Indian reservations were established. The application of state law could result in the loss of these lands or even in the disappearance of an entire reservation. State law gives no recognition to these matters, so its application can often undermine federal policy.

3. The effect of the movement of the Missouri River on the purposes of the Omaha Indian Reservation is the dominant consideration in determining the outcome of this case. The reservation's agricultural purpose would be substantially undermined if it is found that the 2,900 disputed acres have been eliminated from the reservation. On the other hand, upholding the petitioners' claims would result in an unjustified windfall. In these circumstances, federal law recognizes and gives effect to the Tribe's paramount interest.

4. This case can and should be resolved without reference to the burden of proof statute, 25 U.S.C. § 194, but if it is applied it should be done in a manner that gives effect to its protective purpose, resolves ambiguities in the Indians' favor, and avoids both constitutional pitfalls and a crabbed or restrictive result. Section 194 is akin to the judicially fashioned rule that legal ambiguities must be resolved in the Indians' favor and, like that rule, reflects an "eminently sound and vital" aspect of the federal obligation to protect Indian property.

I

FEDERAL LAW GOVERNS INDIAN TITLE DISPUTES

Analysis of this Court's recent decisions in *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), hereafter *Corvallis*, and *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), hereafter *Oneida*, compels the conclusion that the title dispute in this case is governed by federal law.

Corvallis held that state law, rather than federal law, determines titles to land affected by the movement of navigable waters "unless there were present some other principle of federal law requiring state law to be dis-

placed.” 429 U.S. at 371. Since *Corvallis* involved a title dispute between the State of Oregon and a private landowner where no federal interest was implicated, state law was held to be controlling. The *Corvallis* opinion made it very clear that the presence of a federal interest requires the application of federal law.

In the first paragraph of the *Corvallis* opinion, the Court noted that “[t]he [Willamette] river is not an interstate boundary,” 429 U.S. at 365, thereby negating one possible federal interest. See 429 U.S. at 375. There were several other references in the opinion to the absence of any other federal concerns that would require the application of federal law.¹ Perhaps most important for purposes of this case was the Court’s discussion of *Hughes v. Washington*, 389 U.S. 290 (1967). *Hughes* applied federal law in determining the ownership of oceanfront property in the State of Washington. For this reason, two *amici* states urged the *Corvallis* Court to overrule *Hughes*. In response, the Court suggested that *Hughes* was correctly decided because of the federal interest in determining land boundaries adjacent to the international sea. 429 U.S. at 377 n.6. Thus, *Corvallis* expressly acknowledged that the presence of a federal interest requires the application of federal law.

Oneida, supra, left no doubt that determinations of Indian title are a matter of exclusively federal concern and require the application of federal law. The Court’s

¹In addition to the qualifying clause quoted in the previous paragraph, see, e.g., 429 U.S. at 372 (“Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right. . . .”); and 429 U.S. at 381 (“We also think there was no other basis . . . to support the application of federal common law to override state real property law”).

unanimous opinion reiterated this theme time and again in its thorough review of the decisional law spanning a period of almost 150 years:

Once the United States was organized and the Constitution adopted, these tribal rights to Indian land became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

414 U.S. at 667. And:

The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13 [F]ederal law, treaties and statutes protected Indian occupancy and . . . its termination was exclusively the province of federal law.

414 U.S. at 670. In its review of the decision in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), the Court quoted the following excerpts:

New York “possessed no power to deal with Indian rights or title The rights of the Indians to occupy those lands “do not depend on . . . any . . . statutes of the State, but upon treaties, which are the supreme law of the land; *it is to these treaties we must look to ascertain the nature of these rights, and the extent of them.*”

414 U.S. at 671 and 672, emphasis added. The emphasized portion of this quotation was repeated again at a later point in the *Oneida* opinion, 414 U.S. at 678. *Oneida* also reviewed the decision in *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), *cert. denied, sub nom. City of Salamanca v. United States*, 316 U.S. 694, in the following terms:

[T]he Court of Appeals for the Second Circuit held that the Indian rights were federal and that "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent." There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law

414 U.S. at 674. The Court also noted "that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians," and referred to "the reach and exclusivity of federal law with respect to reservation land and reservation Indians." 414 U.S. at 678.²

There is a close relationship between the *Corvallis* and *Oneida* decisions. *Corvallis* held that the federal origin of the states' title to the beds of navigable waters under the equal footing doctrine is not a sufficient basis to apply federal common law to the determination of land titles. "Once the equal-footing doctrine had vested title to the riverbed in [the State] as of the time of its admission to the Union, the force of that doctrine was spent." 429 U.S. at 371.

Similar reasoning and the application of the well-pleaded complaint rule had led the Second Circuit to conclude in *Oneida* that the federal courts lacked

²There are similar expressions elsewhere in the opinion. See 414 U.S. at 672 nn. 7 & 8, 677, 678, and 680 n. 15. See also *Minnesota v. United States*, 305 U.S. 382, 389 (1939) ("Indian lands under trust allotments [are] a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.").

jurisdiction over an Indian tribe's ejectment action. That court held that the tribal claim to land did not "arise under" federal law within the meaning of 28 U.S.C. § 1331. See 464 F.2d 916 (2d Cir. 1972). This Court reversed, concluding that the Second Circuit had erred in failing to distinguish between Indian title and ordinary private title. Federal origin of private titles is not sufficient to establish federal jurisdiction because "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 U.S. at 676. See also 414 U.S. at 683-684 (Rehnquist, J. concurring). By contrast, Indian property rights exist "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." 414 U.S. at 677. *Packer v. Bird*, 137 U.S. 661 (1891), and *Joy v. City of Saint Louis*, 201 U.S. 332 (1906), both of which were relied upon in *Corvallis* (see 429 U.S. at 377 and 380) and are cited by the petitioners and their supporting amici here, were distinguished as inapplicable where Indian title is at issue. 414 U.S. at 676-677. Owing to the continuing role of the federal government in protecting and supervising Indian property as well as the inapplicability of state law, the tribal ejectment action was held to present a federal question. Thus, the holding of *Oneida* was predicated on the unique and distinctive federal interest in Indian title, a matter which, under *Corvallis*, is exactly the type of federal involvement that mandates the application of federal law to determine the outcome of this case.³

³That the result of *Oneida* is in harmony with the principles applied in *Corvallis* is further shown by *Corvallis*' reliance on the following quotation from *Wilcox v. Jackson*, 10 U.S. (13 Pet.) 498, 517 (1839);

We hold the true principle to be this, that whenever the question in any court, state or federal, is whether a title to

[footnote continued]

Given the comprehensive review of the subject in *Oneida* and this Court's emphatic and unanimous conclusion that the nature and extent of Indian property rights are and always have been the exclusive province of federal law, it would be surprising if any of this Court's prior decisions held that the nature and extent of federally protected Indian property rights are controlled by state law. The petitioners place their reliance on *Francis v. Francis*, 203 U.S. 233 (1906); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88-89 (1922); and *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943). The *Francis* case, *supra*, involved the meaning of a federal treaty. This Court found that the construction of that treaty by the State Supreme Court was correct as a matter of federal law. In *United States v. Oklahoma Gas & Electric Co.*, *supra*, the federal statute at issue specifically made grants of rights of way for highways through Indian lands subject to "the laws of the State or Territory in which the lands are situated." The federal question was the degree to which this provision incorporated state highway laws. The Court looked for, but failed to find, any federal or Indian interest to be served by giving a restricted meaning to the plain words of the statute, 318 U.S. at 211, took pains

land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation*. . . .

429 U.S. at 377, emphasis in *Corvallis*. In *Oneida* and this case the Indians and the United States have claimed that title has not passed from, and is still held by, the United States. Applying the *Corvallis-Wilcox* principles, it therefore follows that "that question must be resolved by the laws of the United States."

to limit the effect of its decision to the unique situation of the Kickapoos in Oklahoma, 318 U.S. at 215-217, and expressly left open the question of whether secretarial regulations could preempt state law, 318 U.S. at 210.

The petitioners' reliance on *Brewer-Elliott*, *supra*, is particularly odd. That case held that the Indians owned title to the bed of the Arkansas River which was held to be non-navigable notwithstanding the Oklahoma Supreme Court's determination of navigability. *Oklahoma v. Texas*, *supra*, also refused to follow another navigability decision of the Oklahoma Supreme Court, 258 U.S. at 591, and adopted the common law rule that conveyances of riparian land extend to the middle of non-navigable streams. 258 U.S. at 595-596. See n.5, *infra*.

No decision of this Court known to us or cited by the petitioners has held that questions involving the nature and extent of Indian property rights must be controlled by state law in the absence of a federal statute making state law applicable.⁴ See e.g., *Winters v. United States*, 207 U.S. 564 (1908), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), holding that Indian water rights are controlled exclusively by federal law; *Alaska Pacific Fisheries v.*

⁴General federal laws that require the application of state laws include 25 U.S.C. § 231, 311, 348, 349, 357 and 398. On at least three occasions, Congress has specifically legislated to make state laws govern property disputes between Indians and non-Indians on the Omaha Reservation. Section 2 of the Act of June 27, 1894, 28 Stat. 95; Section 2 of the Act of March 26, 1898, 30 Stat. 344, 345; and Section 3 of the Act of February 28, 1899, 30 Stat. 912, 913. See also the Act of December 30, 1916, 39 Stat. 865. All of these laws illustrate Congress' understanding that federal consent is necessary for state laws to apply to Indian lands. See *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 177 and n.16 (1973).

United States, 248 U.S. 78 (1918), holding as a matter of federal law that the reservation for Indians of "the body of lands known as the Annette Islands" includes the adjacent navigable waters; *United States v. Winans*, 198 U.S. 371 (1905), holding as a matter of federal law that private riparian lands are impressed with an easement to enable Indians to gain access to their traditional fishing sites; and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 477-479 (1976), refusing to give effect to a statute, 25 U.S.C. § 349, specifically requiring the application of state law because that statute was found to be inconsistent with the policies underlying subsequent congressional enactments.

This is not to say, however, that state law always is irrelevant and must be ignored whenever Indian matters are in dispute. In applying federal law, federal courts may look to, though are not bound by, related state laws. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105-107 (1972). Under some circumstances, state substantive law may be adopted as the federal rule of decision provided that it is not inconsistent with the federal interests at stake.⁵

⁵ For example, *Oklahoma v. Texas*, *supra*, stated in *dictum* that while the federal government's intention is controlling, "if its intention be not otherwise shown, it will be taken to have assented that its conveyance [of riparian lands] should be construed and given effect in this particular according to the law of the state in which the land lies" and that this rule applied to Indian lands. 258 U.S. at 595. The holding of the case was that the government's intent in setting aside the Indian lands was clearly manifested, so that there was no occasion to resort to state law. *Id.* The Court also gave its opinion that the Oklahoma statutes relied on by the state were not applicable in any event, so no conflict of laws was shown. *Id.* at 596.

These principles were recognized and applied in *Board of County Commissioners of Jackson County v. United States*, 308 U.S. 343 (1939). The issue was whether the United States should be able to collect interest on taxes unlawfully paid by an Indian to a political subdivision of a state. State law did not provide for the payment of interest. In denying the government's claim to interest, the Court held that "[s]ince the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas," citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). 308 U.S. at 349-350. State law was "absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy." 308 U.S. at 351-352.

To summarize, where Indian title to land is disputed, as in this case, federal law controls. Assuming, *arguendo*, that any reference to state law is appropriate under the circumstances here presented, such state law will be given recognition as the federal rule only if consistent with federal policy. It is to the federal policies involved in Indian land title disputes, therefore, to which we now turn our attention.

II

THERE IS AN OVERRIDING FEDERAL INTEREST
IN DETERMINING THE OWNERSHIP OF INDIAN
LANDS AFFECTED BY THE MOVEMENT OF BODIES
OF WATERS

We have demonstrated that the determination of the nature and extent of Indian land title is a matter committed to federal, not state, law. The interest of the United States in protecting the Indians' ownership of their lands and in furthering federal Indian policies repeatedly has been affirmed. *See, e.g., Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473-474 and n.13 (1976), and cases therein cited and discussed; *United States v. Minnesota*, 270 U.S. 181, 193-195 (1926); and *McKay v. Kalyton*, 204 U.S. 458, 469 (1907). But the petitioners and their supporting *amici* appear to argue that the general interest of the United States in protecting Indian lands is not a sufficient basis upon which to predicate the application of federal law in this case. They contend that federal law has no real or basic connection to this controversy and that, from the standpoint of the federal government, it does not matter how the law of accretion, avulsion, and the like, is applied. *Amici* California, et al., even go so far as to suggest that the federal interest in protecting Indian rights would be furthered by the application of state law. *Amicus Curiae* Brief of California, et al., at 28-33.⁶

⁶ *Amici* California, et al., argue that the issue here is simply a choice among otherwise neutral laws of real property. That this is not true is illustrated by the prior cases reaching this Court. States have an inducement to favor rules which enhance their rights in the beds and former beds of streams. In *Bonelli, infra*, Arizona claimed the land at issue based on the land's former status as streambed. In *Corvallis, supra*, Oregon claimed the land as present

[footnote continued]

While we believe that the historic and continuing federal interest in protecting Indian lands, taken by itself, is a sufficient basis on which to predicate the application of federal law, we shall now show that the content of the rules for determining the ownership of lands that are arguably Indian and have been affected by the movement of waters is a matter of direct and substantial federal concern and therefore must be governed by federal law.

Numerous decisions have recognized the importance of the location of Indian lands in relation to adjacent waterways. Indeed, since the primary purposes for the establishment of many Indian reservations include the Indians' pursuit of irrigated agriculture and traditional hunting, fishing and related activities, *see, e.g., Winters v. United States*, 207 U.S. 564 (1908), and *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968), the Indians' ownership of lands adjacent to and in the vicinity of rivers, lakes, streams, tidal waters, oceans, etc., surely ranks in the forefront of federal concerns.⁷

streambed, impairing a former patent. In *Hughes v. Washington, supra*, the state claimed littoral land that had been ocean bed, cutting off a riparian owner. In *Oklahoma v. Texas, supra*, and *Brewer-Elliott Oil Co., supra*, in pursuit of its claim Oklahoma advocated both navigability of the Red River and severance of the streambed from the upland by state legislation.

These cases illustrate that the states are more than neutral arbiters; they have direct financial and proprietary interests in formulating and applying rules that will tend to make them the winners in these controversies. *See Corvallis, supra*, 429 U.S. at 393 (Marshall, J. dissenting, quoting the Solicitor General's Brief in *Hughes v. Washington, supra*). One of the fundamental purposes of federal guardianship has always been to protect a "dependent people" from their more numerous and antagonistic white neighbors and from the state and local governments that reflect the same hostility. *United States v. Kagama*, 118 U.S. 375, 384-385 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-561 (1832).

⁷ Where, as in this case, a body of water marks the boundary of an Indian reservation, there is an additional reason for applying

[footnote continued]

Thus, for example, in the seminal Indian water rights case, *Winters v. United States*, *supra*, the fact that the Milk River formed the boundary of the Fort Belknap Indian Reservation was considered especially significant. The court of appeals commented: "Why was the northern boundary of the reservation located 'in the middle of Milk river' unless it was for the purpose of reserving the right to the Indians to the use of said water for irrigation, as well as for other purposes?" 143 Fed. 740, 745 (9th Cir. 1906). If state law is held to govern title to Indian lands affected by the movement of streams and rivers, the Indians could be cut off from access to the waters that were intended to be the source of essential irrigation supplies, thereby making it difficult or impossible to fulfill one of the most essential purposes of the reservation. Applying principles of state law uninfluenced by federal considerations could have the effect of eliminating a significant portion, or even all, of the irrigable acreage within a reservation.⁸ Indeed, an entire reservation could disappear or be washed away.

With regard to fishing, *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827, cited with approval in *Choctaw Nation v. Oklahoma*, 397

federal law. Indian tribes are sovereign entities. The boundaries of their reservations are therefore considered political boundaries akin to dividing lines between states. Federal law governs interstate boundaries and is also the source for determinations of reservation boundaries. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 n. 8 (1970).

⁸ For example, this case involves title to 2,900 acres of land which is more than six times the amount of irrigable acreage within the Cocopah Reservation located along the banks of the Colorado River in the State of Arizona. See *Arizona v. California*, 373 U.S. 546, 594-601 (1963), *decree*, 376 U.S. 340, 344 (1964). The Chemehuevi Reservation on the California side of the Colorado was adjudicated water rights for only 1,900 irrigable acres. *Id.*

U.S. 620, 633 (1970), follows *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), and holds that the Quillayute Indian Reservation includes the Quillehute River and its tidal waters because of the Indians' dependence on their abundant fishery resources. See also *Donnelly v. United States*, 228 U.S. 243, 259 (1913). If the petitioners' position is accepted, the results for these and similarly situated reservations could be disastrous. If a river were to move to a new location, state law might operate to divest the tribe of its title in favor of the state. See *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). Or the state might claim ownership of lands formed by accretion immediately adjacent to a river (or tidal waters) and then prevent the Indians from gaining access to a river or from utilizing those lands for essential fishery related purposes. See *Hughes v. Washington*, 389 U.S. 290 (1967). Or the movement of a river and the application of state law might result in the creation of privately owned lands between the river and the upland portion of a reservation with the same devastating consequences. These considerations demonstrate the overriding and overwhelming federal interest in the determination of ownership of lands claimed by Indians and affected by the movement of navigable waters. Compare *Corvallis*, *supra*, 429 U.S. at 377 n.6.⁹

⁹ The federal interest in the ownership of lands affected by the movements of waters is underscored by 18 U.S.C. § 1165 which makes it a crime to hunt, trap, or fish on Indian lands without lawful authority. The statute requires the government to prove Indian ownership of the land where the alleged offense takes place as an essential element of the crime. See *United States v. Finch*, 548 F.2d 822, 827 (9th Cir. 1976), *reversed on other grounds sub nom. Finch v. United States*, 433 U.S. 676 (1977). The lands most frequently involved in such prosecutions are riparian to, or underlie, bodies of water. *Id.*

Further, the automatic application of state law would not leave any room for consideration of the traditional rules for construing the effect of the treaties and statutes establishing Indian reservations. We have in mind such familiar, often-expressed principles that the extinguishment of Indian title requires federal consent, *Oneida, supra*; that the extinguishment of Indian rights is not to be lightly implied, *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934); that ambiguities must be resolved in favor of the Indians, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); that treaties must be interpreted as the Indians would have understood them, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); that "the terms of the treaty are carried out . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people," *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); and, most importantly for purposes of this case, that special Indian rights, privileges and immunities will be implied to the extent necessary to fulfill the purposes of the reservations and federal Indian policies, *Arizona v. California*, 373 U.S. 546, 594-601 (1963); *Squire v. Capoean*, 351 U.S. 1, 9 and 10 (1956); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371, 381 (1905); and *United States v. Rickert*, 188 U.S. 432, 437-438, 442 and 443-444 (1903).

Having shown the concrete interest of the federal government in the outcome of disputes involving title to Indian lands adjacent to or underlying bodies of water, we shall now proceed to show how federal policies will be implemented through the application of federal law in this case.

III

FULFILLING THE PURPOSES OF THE OMAHA RESERVATION AS WELL AS OTHER CONSIDERATIONS REQUIRE THAT THE TITLE DISPUTE BE RESOLVED IN THE INDIANS' FAVOR

As explained in the previous section, rigid application of accretion or avulsion principles without regard to federal interests could destroy an entire reservation, or remove all of a reservation's irrigable acres or eliminate a reservation's riparian access that is essential to the fulfillment of its purposes. Therefore, the effect of a channel shift on the purposes of the Omaha Reservation must be the dominant consideration in determining the outcome of this case.

In the 1854 Treaty, the Omahas ceded most of their aboriginal territory to the United States and tentatively set aside part of their domain as their reservation. The treaty provided, however, that the Tribe could reject that area in favor of another, "not to exceed 300,000 acres." Art. 1 of the Treaty, 10 Stat. 1043. The lands reserved in the 1854 treaty were found unsuitable and an alternate tract of 300,000 acres, which included the Barrett Survey area, was permanently set aside. See *United States v. Omaha Tribe of Indians*, 253 U.S. 275 (1920). That land, as modified by subsequent treaties and statutes,¹⁰ has remained the Omahas' home.

¹⁰By the Treaty of March 6, 1865, 14 Stat. 667, the Omahas ceded a tract on the north side of their reservation for the settlement of the Winnebago Tribe. The Act of June 22, 1874, 18 Stat. 146, 170, authorized the purchase of 20 sections of land from the Omahas for the location of the Wisconsin Winnebagos. The Act of August 7, 1882, 22 Stat. 341, superseded the Act of June 10, 1872, 17 Stat. 391, and authorized the sale, with the Omahas' consent, of reservation lands lying west of a right of way previously

[footnote continued]

The 1854 Treaty itself, the subsequent Treaty of 1865, and other legislative enactments clearly establish that the predominant purpose of the Reservation was to supply farmland so that the Omahas would be able to support themselves on a vastly reduced domain by agriculture instead of nomadic hunting. *Cf., Winters v. United States*, 207 U.S. 564 (1908).¹¹ Article 4 of the 1854 Treaty, *supra*, authorized the use of the annuities to be paid to the Omahas for, *inter alia*, "opening farms, fencing, breaking land, providing stock, agricultural implements, seeds," Article 4 of the 1865 Treaty, *supra*, states that "the Omaha Indians [are] desirous of promoting settled habits of industry and enterprise amongst themselves," and want to assign limited quantities of their land in severalty to their members "to be cultivated and improved for their own individual use" The Act of May 15, 1888 for the relief of the Omaha Tribe of Indians in Nebraska, 25 Stat. 150, appropriated \$70,000

granted to a railroad. *See also* the Act of March 3, 1885, 23 Stat. 362, 370.

Significantly, at one time Congress authorized the sale of "surplus," unallotted Omaha lands, but that program was never implemented. *See* the Act of May 11, 1912, 37 Stat. 111, as amended by the Act of January 7, 1925, 43 Stat. 726. Section 5 of the latter statute provided that the disposal of the unallotted lands of the Omaha Reservation "shall not become operative so long as the need thereof exists of maintaining an agency and school for the Omaha Tribe of Indians residing on the Omaha Indian Reservation in the State of Nebraska." After the Omahas were organized under a constitution pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, the sale of tribal lands could not be undertaken absent tribal consent. 25 U.S.C. § 476. *See also* 25 U.S.C. § 463(a).

¹¹The Omahas ceded approximately 5,000,000 acres to the United States in the 1854 Treaty. *See Omaha Tribe of Indians v. United States*, 53 Ct.Cl. 549 (1918), *affirmed in part and reversed in part sub nom. United States v. Omaha Tribe of Indians*, *supra*.

"to enable said tribe to further improve their condition by making improvements upon their homesteads by the purchase of stock, cattle, agricultural implements, and other necessary articles" And the Act of February 18, 1909, 35 Stat. 628, authorized payments from the Omaha Tribe's funds for the protection of tribal lands from overflow and for reclaiming tribal lands. The history of the reservation, *see* note 10, *supra*, also shows that from time to time Congress has given consideration to the amount of land needed by the Omahas and has enacted specific laws authorizing the sale of tribal lands (with the Omahas' consent) when it was felt that such sales would not interfere with the purposes of the reservation. And, as previously noted, Congress did authorize the sale of "surplus" unallotted Omaha lands, but that program was suspended and has never been implemented.

Awarding the 2,900 acres of the disputed agricultural lands to the petitioners would constitute a significant infringement of the Omaha Reservation's foremost purpose. This Court's prior decisions establish that the rights of non-Indian property owners must be subordinated to the extent necessary to carry out the purposes of Indian reservations.

In *Winters v. United States*, 207 U.S. 564 (1908), the Court found that an implied reservation of the waters of the Milk River was necessary to make the Fort Belknap Reservation productive. The Court expressly recognized that competing non-Indian landowners along the Milk River also had great need for the same water, 207 U.S. at 576, but held that the Indian claim must predominate. *Accord: Arizona v. California*, 373 U.S. 546, 599-601 (1963).

In *United States v. Winans*, 198 U.S. 371 (1905), the tribes had reserved the right to fish at their "usual and

accustomed places" outside of the lands reserved for their residence. The United States had patented riparian lands to private parties, and the grantees had obtained a license from the state to erect a fishing wheel on the stream. The wheel precluded Indian fishing at a usual and accustomed place, and the private claim to the land was set up to preclude Indian access to the stream. This Court held that the treaty right required both removal of the fishing wheel and an implied easement of access for the Indians across the private lands. The hardship to the private party was subordinated to the treaty right. "No other conclusion would give effect to the treaty." 198 U.S. at 381. See also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), and *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), holding that notwithstanding the equal footing doctrine, title to the beds of navigable water was vested in Indian tribes.¹²

This analysis is reinforced by two additional considerations. First, as noted in Part I *supra*, it is a fundamental maxim of Indian law that the termination of Indian title requires the consent of the United States. *Oneida, supra*; 25 U.S.C. § 177. Congress never has extinguished the right of the Omaha Tribe to the 2,900 acres that are

¹²The theory of these cases is comparable to the judicially created navigational servitude. Under that doctrine, the federal government has the power to appropriate private interests in water courses in order to carry out federal objectives on navigable waterways. See *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313, 329 and 331 (1973); *United States v. Rands*, 389 U.S. 121 (1967); *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 627-628 (1961); and *United States v. Commodore Park*, 324 U.S. 368, 390 (1945). Both the Indian and the navigation cases hold that achieving the federal objective is the paramount consideration and that private interests must be subordinated to the extent necessary to accomplish that objective.

disputed in this case; nor has Congress ever provided that title to Indian lands could be lost as a result of accretion or avulsion or any other movement of a body of water. See *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, and *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938), holding that the Nonintercourse Act, 25 U.S.C. § 177, precludes loss of Indian lands as a result of laches, estoppel, adverse possession and the like. See *Board of County Commissioners of Jackson County v. United States, supra*, 308 U.S. at 350-351. The petitioners' claim must therefore be predicated on one of two fictions: either federal consent to the extinguishment of tribal title by accretion or avulsion is implied in making the Missouri River one of the reservation's boundaries, or the tribal lands "disappeared" when their top soil eroded away and the "new land" that subsequently appeared in its place was never afforded the protection of the Nonintercourse Act.

Second, in this case the petitioners are claiming the 2,900 acres as accretions. These lands were not patented to them; they were simply entered by the petitioners or their predecessors. While the Tribe stands to lose a significant amount of agricultural land from its reservation, the petitioners are after a windfall.

Federal law takes account of all of these factors. *Bonnelli Cattle Co. v. Arizona, supra*, teaches that doctrines such as accretion, avulsion and reemergence are applied in light of their rationales (as opposed to their technical definitions) and the nature of the federal, state and private interests at stake. 414 U.S. at 328-330.¹³

¹³*Corvallis, supra*, overruled the *Bonnelli* holding that title disputes between states and private landowners are governed by

[footnote continued]

For example, in *Bonnelli* the Court determined that no public purpose related to the navigational servitude was served by state ownership of the former riverbed (414 U.S. at 322-323), that state ownership of both the new riverbed and the old riverbed would constitute an unjustified windfall (414 U.S. at 328), and that it would be unfair to deprive a private owner of riparian land originally included within his grant (414 U.S. at 329-330). For these reasons, the rechanneling of the Colorado River by the federal government was held to constitute an accretion.¹⁴ "The rationale for the application of the doctrine of avulsion is not applicable to this dispute because of the limited interests of the State in the subject property." 414 U.S. at 328. The Court specifically left open the possibility that a rechannelization project could be treated as an avulsion under different circumstances. 414 U.S. at 330 n.27.

In this case, the paramount consideration is the federal interest in preserving 2,900 acres of agricultural land within the Omaha Indian Reservation.¹⁵ This interest will be served either by treating the movement of the Missouri River as an avulsion or through the doctrine of

federal law. *Bonnelli's* conceptualization and application of the principles of federal law were not disturbed in *Corvallis* and remain valid precedent.

¹⁴Alternatively, the Court reached the same result through application of the reemergence doctrine. See p. 23, *infra*.

¹⁵The only claim of the petitioners that may be entitled to some consideration is the possible loss of their riparianness, but their right of access may be protected by federal law. See *Confederated Salish & Kootenai Tribes v. Namen*, 380 F.Supp. 452 (D.Mont. 1974), *affirmed*, 534 F.2d 1376 (9th Cir. 1976), *cert. denied*, 429 U.S. 929. There is no indication, however, that the petitioners have suffered any real loss to their lands to which the 2,900 acres in dispute have allegedly accreted.

reemergence. The concept of reemergence was accepted and applied in *Bonnelli, supra*. Under that doctrine,

. . . when identifiable riparian land, once lost by erosion, subsequently reemerges as a result of perceptible change in the river course, title to the surfaced land revests in its former owner.

Bonnelli, supra, 414 U.S. at 330 n.27, citing *Arkansas v. Tennessee*, 246 U.S. 158, 174-175 (1918), which states:

[W]here the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification.

Everyone agrees that the 2,900 disputed acres were once riparian, that they were covered with water and eroded, and that they subsequently reemerged on the opposite side of the Missouri River as a result of a change in the river's course. The reemergence doctrine should be applied in these circumstances to give effect to the purposes of the Omaha Indian Reservation, to prevent the extinguishment of Indian title without federal consent, and to avoid a windfall to the petitioners. *Winters v. United States, supra*; *United States v. Winans, supra*.¹⁶

Alternatively, and at the very least, the parties seeking to invade the Reservation's purpose by severing its farmland must bear the burden of showing both that federal law supports their position and that the facts supporting their claim are established by a preponderance

¹⁶The case for applying the federal law of reemergence in order to effectuate the purpose of the Omaha Reservation is stronger than either *Winters* or *Winans*, which did not involve any windfalls to the non-Indian claimants.

of the evidence. *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). Failing both, the court of appeals properly held for the Tribe.

IV

SECTION 194 PLACES THE BURDEN OF PROOF ON THE NON-INDIAN CLAIMANTS

As demonstrated in Part III, *supra*, the judgment of the court of appeals should be affirmed without regard to the burden of proof statute, 25 U.S.C. § 194. The following observations are offered in the event the Court should reach the Section 194 issues that are tendered in the petitions under review.

1. The term "white person," as used in the statute, must be held to mean "non-Indian." If the statute were applied to white people, but not to black people, orientals or corporations, serious constitutional problems would be encountered since there is no rational basis for these distinctions. *Strauder v. West Virginia*, 100 U.S. 303 (1880).¹⁷ "[A]n act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril." *Chippewa Indians v. United States*, 301 U.S. 358 (1937).¹⁸

¹⁷As noted, *infra* at 25, there may have been a rational basis in 1822 and 1834 to exclude slaves, but that justification obviously is no longer valid.

¹⁸When Section 194 was enacted in 1822 and reenacted in 1834, the terms "person" and "white person" were synonymous so far as federal law and the Constitution were concerned. *Scott v. Sandford*, 60 U.S. (19 How.) 373 (1857). Since that is no longer true, the statute must be deemed to have been modified accordingly.

2. "White person" must also be interpreted in the context of the Indian Trade and Intercourse Acts of 1802 and 1834, of which Section 194 was a part.¹⁹ It is apparent that Congress used the term "person" in various sections of these acts without any comprehensive attempt at uniform application, so that the intent of each section must be gathered from its purpose and context. In the original version of the 1802 Act, Sections 3 through 10 referred to any "citizen or other person" and Section 19 to any "person or persons." Despite these comprehensive words, it is virtually certain from the purpose and context that "person" in these sections did not include Indians. Conversely, "any person" in Sections 12 and 17 likely included Indians.

A number of these sections referred to "citizens," a term which was then confined to white persons. *Scott v. Sandford*, *supra*. Today the term includes both Indians and other nonwhite persons. Thus "white persons" in 1822 and 1834 could have been intended to refer to all citizens plus alien whites. To put the matter another way, the intent was to use a term which excluded slaves and Indians. So read, the term is properly equated to all persons today.

The 1834 Act introduced the phrase "any person other than an Indian" in Sections 4, 7 and 8. But a number of other provisions used the unqualified term "person" in a context which indicated that it was unlikely that Indians were included. See Sections 2, 3, 9, 10, 11, 13, 14, 15, 17 and 23. Other sections used "person" in a context that probably included Indians. See Section 12, 20, 21, 26. Again, no uniform meaning can be deduced, and one must look to the context and purpose of each section.

¹⁹Section 194 was first enacted in 1822 as an amendment to the 1802 Act, 2 Stat. 139.

The 1834 Act also added a second section referring to "white person"—Section 16 providing for recompense to Indians injured by lawbreakers. In *United States v. Perryman*, 100 U.S. 235 (1879), the Court held that this section excluded an offender who was black. The Court recognized that the likely intent in 1834 was to exclude fugitive slaves from the statute, but we think the Court failed to give proper effect to the abolition of slavery.

3. So far as the application of the statute to the State of Iowa is concerned, it is important to note that Iowa does not claim that its ownership of any of the disputed lands is related to any of the purposes served by the equal footing doctrine or the navigational servitude. Compare *Bonnelli, supra*. Thus, this case does not present the question of whether Section 194 should be applied in such circumstances. But see *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

4. Petitioners argue that changes from "Indians" in the 1822 Act to "Indian" in the 1834 Act require that Indian tribes be excluded from the latter by intended amendment. No such conclusion is justified. The 1822 Act used Indians and white persons first in the plural, then in the singular. The 1834 Act used both terms twice in the singular. The most likely explanation is a redrafter's desire to improve the syntax of the 1822 version, which was somewhat awkward.

It is well established, now as a statutory rule, that singular words may be read in the plural and *vice versa* according to the context and purpose of the statute. 1 U.S.C. § 1. Therefore, petitioners' argument demands some rational connection to the context and purpose in 1834 as distinct from 1822. None is apparent.

Petitioners argue that the change in the Nonintercourse Act (prohibiting the unauthorized sale of Indian lands) from the 1802 version protecting both Indians and tribes to the 1834 enactment which protected only tribes bears on the interpretation of Section 194. There is no logic to this contention. The Nonintercourse Act requires lawful federal authority to validate a conveyance from Indian tribes. Thus, in a lawsuit, the Nonintercourse Act bears on legal issues. Section 194 deals with questions of fact. The 1834 change in the Nonintercourse Act thus has no logical relation to Section 194.

5. In any event, the petitioners' purported distinction between individual Indians and Indian tribes does not make any sense. If the applicability of Section 194 were limited to claims of individual Indians, tribes could assign the disputed land (or the cause of action for its recovery) to individual members. See F. Cohen, *Handbook of Federal Indian Law* 188-189 (1942). And once the land has been assigned to an individual tribal member, either the Tribe or the United States could sue on his behalf. 25 U.S.C. §175; *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 169-173 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-474 (1976); *Heckman v. United States*, 224 U.S. 413 (1912). So far as non-Indian claimants are concerned, the results would be the same, while requiring the charade of a land transfer would not be in keeping with contemporary Indian policy. See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 660 n.11 (1976). See *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976).

6. From the beginning of this Nation's history, this Court has developed special rules for applying and interpreting Indian treaties and statutes. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 533-554 (1832). The

rule that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians" has recently been described as an "eminently sound and vital canon" of construction. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). See also *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-631 (1970), applying that rule to a treaty in a dispute with a state over title to the bed of a navigable waterway.

Section 194 is akin to this judicially developed canon and no doubt was motivated by the same concerns. Just as those opposing Indian claims are required to demonstrate that the law unambiguously supports their position, Section 194 imposes a similar burden on the factual side. It is significant that Congress saw fit to enact a rule imposing the burden of proof in Indian property rights disputes. Otherwise, the burden might have depended upon the luck of the draw: who happened to be in possession and who initiated the lawsuit. Indeed, in the absence of Section 194, aggressive non-Indians would have had an incentive to dispossess Indians from their lands in order to compel the Indians to sue, and then hide behind the traditional rules allocating the burden of proof and the insurmountable difficulties that "uncivilized" Indians unfamiliar with English would experience in proving their cases. For these "eminently sound and vital" reasons, non-Indians should bear the burden of proof in such cases even in the absence of Section 194. This Court certainly would be justified in fashioning such a rule to carry out federal Indian policy just as it has consistently resolved legal ambiguities in the Indians' favor.²⁰

²⁰The petitioners and their supporting amici contend that the Eighth Circuit's application of Section 194 could have a
[footnote continued]

7. To the extent that there are any ambiguities in Section 194, they must be resolved in favor of the Indians and in a manner that effectuates its protectionist purpose. *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Smith v. McCullough*, 270 U.S. 456, 463-465 (1926). Here, as in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 176 (1973), there is "no reason to give [the] language [of the Indian statute] an especially crabbed or restrictive meaning."

devastating impact on land titles throughout the United States. It is hard to take this assertion too seriously, however, since the statute has been on the books since 1822 and this is the first time that this Court has been called upon to define its proper scope. If the petitioners and their amici were correct, one would certainly have expected to find the statute invoked much more frequently, especially in such a heavily litigated area. See, e.g., *Oneida, supra*, 414 U.S. at 699 and n. 5.

Actually, the critical factor in resolving virtually all Indian property rights litigation has been the canon requiring resolution of legal ambiguities in the Indians' favor, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Winters v. United States*, 207 U.S. 564, 576-577 (1908); and *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1976), and the Court has just reaffirmed the continuing validity of this rule. *State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 47 U.S.L.W. 4111, 4117 (1979).

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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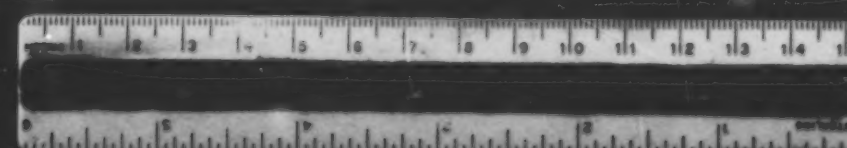
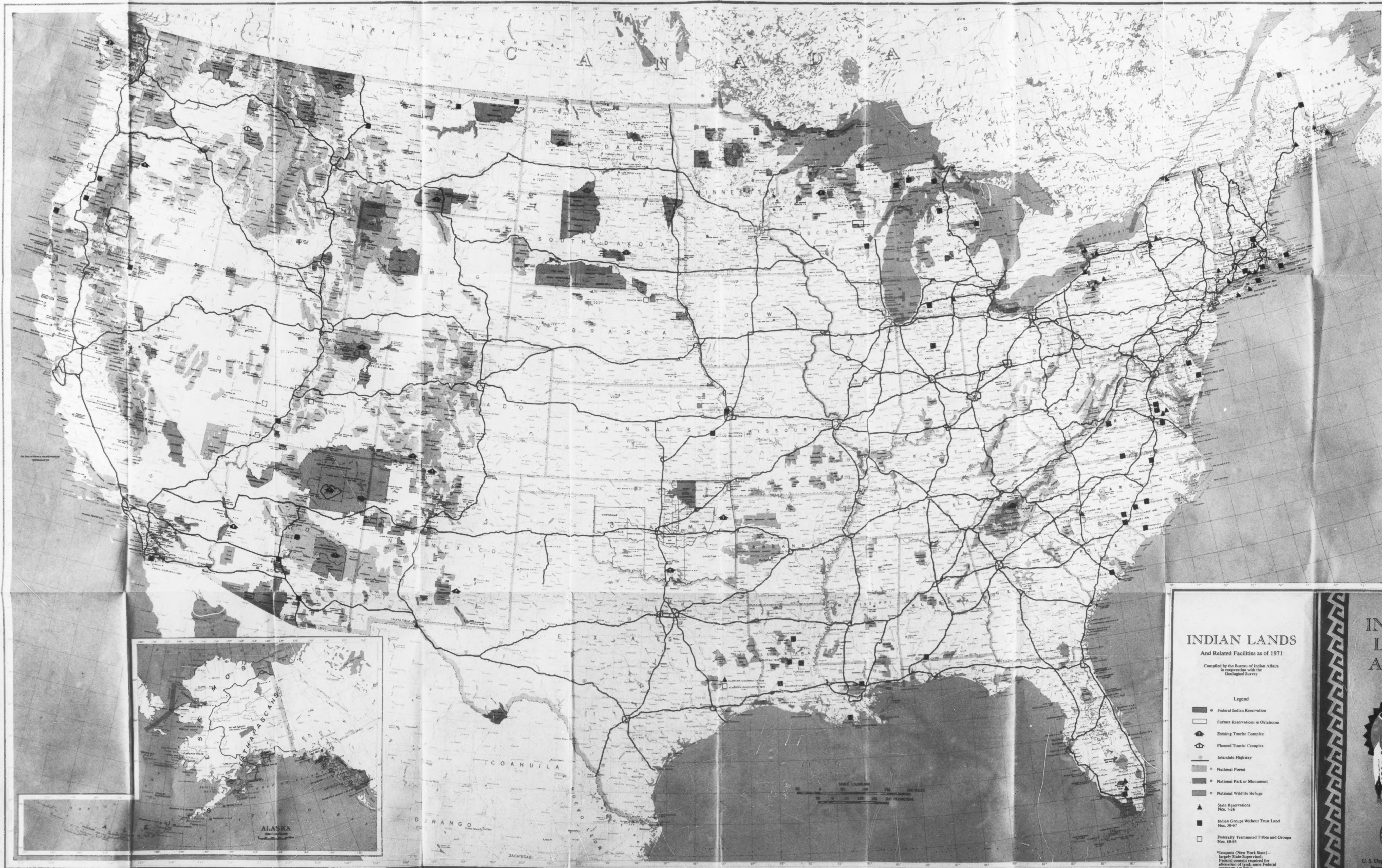
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February, 1979

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